FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JACKSON,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 97-99032
D.C. No.
CV-91-04249-R
OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
November 10, 1998—Pasadena, California

Filed May 8, 2000

Before: William C. Canby, Jr., Diarmuid F. O'Scannlain and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Canby; Partial Concurrence and Partial Dissent by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a state capital trial, defense counsel's failure to investigate and present available expert medical evidence on the defendant's impaired mental state at the time of the charged crime constitutes constitutionally ineffective assistance of counsel.

After smoking cigarettes laced with PCP, appellant Michael Jackson went into a West Covina, California street and began to exhibit bizarre behavior. Someone called the police.

When West Covina Police Officer Kenneth Wrede arrived and confronted Jackson, a struggle ensued. Jackson followed when Wrede ran to his patrol car. Jackson removed a shotgun from the vehicle and chambered a shell. At one point, Jackson put the shotgun down on the roof of the patrol car, and Wrede lowered his drawn handgun. Jackson then picked up the shotgun and fired at Wrede, killing him.

Jackson was charged in California state court with first-degree murder. A key issue was Jackson's mental state while intoxicated by PCP.

Defense counsel instructed two psychiatrists to determine whether Jackson had the mental capacity to form specific intent, deliberate, or harbor malice. Although defense counsel did not request it, both psychiatrists investigated Jackson's background.

Dr. Skrdla's report discussed Jackson's dishonorable discharge from the army, and armed robberies he committed while he was a teenager. Skrdla concluded that Jackson was competent to stand trial, and that he was intoxicated but legally sane at the time of the offense. Although Skrdla found that because of drug intoxication Jackson did not deliberate, premeditate, or reflect on the gravity of his contemplated acts, he believed that Jackson was capable of harboring malice aforethought.

In his report, Dr. Mead included background information: Jackson began glue-sniffing at age 14; had several "bad trips" on PCP; had lost consciousness during a fight; and once had thought that his house was charged with electricity.

Jackson's attorney decided not to call Dr. Skrdla to testify in the guilt phase of the trial to avoid conceding that Jackson

was capable of forming the specific intent to kill, and did so before he shot Wrede. He also did not want to open the door to damaging background information. On that basis, defense counsel moved in limine to exclude background matters in Skrdla's report from being delivered to the prosecution, and from cross-examination of Dr. Mead. The district court denied the motion; defense counsel elected not to call Dr. Mead.

The decision of Jackson's lawyer not to call Dr. Skrdla or Dr. Mead was taken in the context of Cal. Pen. Code § 29, which precludes guilt-phase expert testimony on whether a defendant had required mental states, including intent and malice aforethought. Defense counsel believed that § 29 applied to impairment by voluntary intoxication, and would have prevented him from eliciting a medical expert's opinion that Jackson had not premeditated.

To avoid the problem presented by § 29, defense counsel posed hypothetical questions to Dr. Aniline, who did not examine Jackson, but was an expert on the effects of PCP. The questions posited almost all the evidence of Jackson's actions before the shooting and his arrest. Dr. Aniline testified that a person so acting would have been intoxicated by PCP, and that his ability to deliberate would have been impaired.

The jury convicted Jackson as charged.

In the penalty phase, a prosecution witness testified that Jackson had sodomized him when Jackson was in the army. Although Jackson had told defense counsel that the incident had not occurred as reported by the victim, the attorney did not investigate or interview the victim before he testified, made no pretrial motion, and did not object to the testimony.

Defense counsel had not expected the case to reach the penalty phase. His preparation took less than two hours a few weeks before the penalty trial began, plus interviews of witnesses on the day they testified, and a review of Jackson's

military and medical records. The defense case in mitigation consisted solely of testimony by Jackson's wife and his mother. There was no investigation or evidence of Jackson's social history, his addiction to PCP, the consequences of PCP addiction, and no expert medical testimony.

The jury returned a death verdict. The California Supreme Court affirmed Jackson's conviction and sentence.

On federal habeas corpus, Jackson contended that he received ineffective assistance of counsel in both the guilt and penalty phases of his trial. Dr. Jackman's declaration indicated that Jackson had suffered repeated beatings in childhood, and that his mother had choked him when she was angry with him. It noted that Jackson showed signs of mental illness when he was a child, and had been diagnosed as a schizophrenic.

The district court denied Jackson's petition, and he appealed.

[1] The decision of Jackson's counsel not to put Dr. Skrdla on the stand was a judgment call within the range of competent counsel. [2] Jackson's counsel decided that items in the background material would have been prejudicial if Dr. Mead testified and the report had to be handed over to the prosecution. [3] Again, counsel's decision appeared to be a judgment call within the range of decisions of competent counsel.

[4] Although Dr. Mead's testimony would have helped Jackson, it was limited in scope and probable effect. [5] Jackson's counsel was not wrong in concluding that § 29 would have prevented him from eliciting a medical expert's opinion that Jackson had not premeditated. The inability of Dr. Mead to testify on premeditation decreased the value of his possible contribution. Counsel's decision not to call him was within the realm of permissible professional judgment.

[6] Counsel is not required to dictate what experts need to do to render professional services. Moreover, because experts may not testify directly that a defendant did not premeditate, it was a reasonable professional judgment to emphasize the effects of PCP generally on mental processes. Even if it were assumed that counsel was ineffective in not having Dr. Aniline examine Jackson, there was not a reasonable probability that the result would have been different if the examination had occurred.

[7] Jackson failed to show deficient performance and resulting prejudice in counsel's preparation and presentation of expert medical testimony in the guilt phase of his trial.

[8] In failing to prepare and investigate for a penalty defense, Jackson's counsel fell below the requisite standard of competence. [9] The testimony of the two defense witnesses covered less than 30 pages of trial transcript. Jackson's counsel did not investigate or prepare evidence regarding Jackson's addiction to PCP, and the meaning and consequences of such addiction. [10] The defense presented no medical testimony. Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase.

[11] One of the primary mitigation factors was the clouded mental condition of Jackson caused by drug intoxication. The jury never heard from any medical expert who had examined Jackson, or who could testify as to his actual condition at the time of the crime. Section 29 does not constrain expert testimony concerning mental state at the penalty phase. [12] Jackson's counsel did not conduct any investigation into an act of aggravation of which he had notice—an alleged sodomy committed by Jackson.

[13] Counsel's deficiencies at the penalty phase were prejudicial. Dr. Jackman's report presented a very different picture

of Jackson than any the jury was allowed to consider. [14] Medical testimony was available that Jackson's ability to think was grossly impaired. [15] There was a reasonable probability that, but for counsel's unprofessional errors, the result of the penalty proceeding would have been different.

Judge O'Scannlain concurred in part and dissented in part, writing that the majority impermissibly used hindsight and speculation to conclude that Jackson was denied the effective assistance of counsel in the penalty phase of his trial.

COUNSEL

Allyn O. Kreps, Troy & Gould; Robert S. Draper, O'Melveny & Myers, Los Angeles, California, for the petitioner-appellant.

Donald de Nicola, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

In 1983, Michael Jackson, while grossly intoxicated with phencyclidine (PCP), shot and killed West Covina Police Officer Kenneth Wrede. Several witnesses testified to Jackson's bizarre behavior before the event, and to the brief encounter that ended in the shooting. Jackson concedes that he shot Officer Wrede, but he has always maintained that he has no recollection of the encounter whatsoever. The question before us is whether Jackson was provided with effective assistance of counsel in presenting his defense to the capital charge that resulted.

Jackson was convicted of first-degree murder and sentenced to death. The California Supreme Court affirmed the conviction and sentence. *See People v. Jackson*, 49 Cal. 3d 1170, 783 P.2d 211 (1989) (in bank), *cert. denied*, 498 U.S. 881 (1990). Jackson subsequently exhausted his state collateral remedies and then filed a petition for habeas corpus in the district court. *See* 28 U.S.C. § 2254. The district court, after holding an evidentiary hearing on some of the claims, denied the petition. The district court then granted a certificate of probable cause and stayed Jackson's execution pending this appeal. We now affirm the judgment of the district court insofar as it upholds Jackson's conviction for first degree murder, but we reverse that part of the judgment that upholds the sentence of death. We conclude that Jackson received ineffective assistance of counsel, to his prejudice, at the penalty phase of his trial.

FACTUAL BACKGROUND

On the morning of August 31, 1983, Jackson was with friends smoking PCP-laced cigarettes in a garage in West Covina, California. He was a regular PCP user, and on this occasion he had smoked more than one laced cigarette. Suddenly, he jumped up, kicked off his shoes, and ran outside into the street. There several people observed him jumping around, falling down, and diving head first onto the pavement. One witness saw Jackson start to cross the street several times, only to change his mind each time seemingly without cause. The same witness said Jackson was pulling and slapping at his hair.

A few blocks away, a motorist who had seen Jackson stopped to report Jackson's unusual behavior to Officer Wrede. Wrede radioed from his patrol car that he was going to investigate a "possibly dusted" suspect, and requested additional officers. Wrede then drove to Jackson's location and confronted Jackson. He asked Jackson to sit down on the curb, but Jackson did not comply and began to walk away.

Wrede then struck Jackson in the back of the legs with his baton. Jackson and Wrede then wrestled each other to the ground. As they got back up, Wrede repeatedly sprayed Jackson in the face with mace, to no apparent effect. Jackson went to an adjacent yard and attempted unsuccessfully to pull up a tree. He removed two long support stakes and threw them at Wrede.

Wrede ran to his patrol car and opened the driver's door, possibly to radio again for back-up. Jackson went to the front passenger-side door, opened it, and reached for a shotgun that was in a rack inside of the car. Jackson and Wrede wrestled for control of the shotgun and Jackson prevailed, ripping the gun and its rack from the mounting and out of the car. Wrede drew his gun and moved to the left rear of the car, while Jackson remained on the passenger side and pointed the shotgun across the top of the car toward the light bar and Wrede. After some difficulty because the rack was still fastened to the shotgun, Jackson managed to pump a shell into the chamber. There was some conflict in the evidence over what happened next, but at some point Jackson lowered his gun onto the roof and Wrede lowered his gun. Jackson then picked the shotgun back up and fired, hitting the light bar and Wrede. One pellet hit Wrede in the eye, killing him. The entire encounter between Jackson and Wrede had lasted less than four minutes.

Jackson then stumbled away from the patrol car, still carrying the shotgun and rack. Police back-up units arrived less than a minute after the shooting. Jackson walked toward one officer, who testified that Jackson said, "Now I'm gonna kill all the fucking pigs." No other witness testified to hearing that statement. One officer yelled for others to shoot; Jackson replied, "I'm gonna shoot you." Another officer released a police dog, which attacked Jackson. Jackson stunned the dog by hitting him with the shotgun, and said, "I'm going to kill you, too, dog." The dog recovered and bit Jackson, causing him to drop the shotgun. Three officers then tackled Jackson, who resisted and reached unsuccessfully for the gun worn by

one of them. The officers succeeded in subduing and handcuffing Jackson.

Jackson was taken to a police station, but his blood pressure fell to 90/40 and he was removed to Queen of the Valley Hospital by 1:30 p.m. At the hospital, Jackson was unable to respond to verbal commands. Medical records describe him as incoherent, in shock, and semi-conscious. A blood sample was taken and was later found to contain PCP in the amount of 176 nanograms per millileter. At 3:00 p.m., an officer conducted a booking interview. Some time later, according to a nurse's testimony, Jackson without any questioning or prompting asked, "Why am I under arrest? Are you charging me with killing a cop?"

Shortly after 4:00 p.m., Jackson was transferred to the jail ward of the Los Angeles County Medical Center, where two officers read him his *Miranda* rights. One of the officers then interrogated Jackson, and testified that Jackson asked what he was arrested for. When told "murder," Jackson responded in a questioning tone of voice, "I killed a policeman?" At the end of the interrogation, as the officer was leaving, Jackson said, "I didn't kill that policeman."

The next day, the same officer and his partner returned to interrogate Jackson further. The officer testified that Jackson waived his *Miranda* rights, and that Jackson remembered the officers from the previous day, stating that they were "the cops who say I killed that officer with a shotgun." The officer testified that neither he nor his partner had told Jackson that a shotgun had been used.

Jackson remained in the jail ward of the Medical Center for some three weeks. His trial began some six months after the incident.

THRESHOLD PROCEDURAL ISSUES

The State raises two procedural points that we address before considering the claims of ineffective assistance of

counsel. First, the State contends that it is entitled to the expedited procedures and greater deference to state court rulings provided by Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221-26 (Apr. 24, 1996) (codified at 28 U.S.C. §§ 2261-2266). As the State recognizes, most of the provisions of the Act do not apply to this case because Jackson's petition was filed in district court prior to the Act's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Congress provided, however, that Chapter 154 was to apply to all cases "pending on or after the date of enactment" of the Act. Pub. L. No. 104-32, § 107(c), 110 Stat. 1226. The State contends that it meets the various criteria that Chapter 154 establishes as conditions of its applicability to a "unitary review" state. *See* 28 U.S.C. § 2265. We need not examine this claim further, because we recently rejected an identical argument by the State in *Ashmus v. Woodford*, No. 99-99007, 2000 WL 256627 (Mar. 9, 2000) (amended opinion). *Ashmus* controls here.

The State next contends that Jackson's ineffective-assistance claims are all procedurally defaulted because the California Supreme Court denied those collateral claims "both on the merits and as untimely." The untimeliness ruling, argues the State, is an independent state procedural ground that precludes federal habeas corpus relief. *See Coleman v. Thompson*, 501 U.S. 722, 729-30, 734-35 (1991). For the procedural default rule to apply, however, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (citing *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991)). Prior to the California Supreme Court ruling in *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (1993), California's untimeliness rule did not meet that standard, and consequently did not bar federal habeas review. *See Morales v. Calderon*, 85 F.3d 1387, 1388, 1393 (9th Cir. 1996). In *Morales*, we found no need to determine whether *Clark* clarified California's timeliness requirement sufficiently to raise a

bar to federal review, because *Clark* was decided after the California Supreme Court denied Clark's petition. *Id.* Here, we reach the same conclusion, because *Clark* was decided only thirty-two days, and became final only two days, before Jackson's state habeas petition was filed in the California Supreme Court. Any undue delay on the part of Jackson necessarily occurred before *Clark*. *See Calderon v. United States Dist. Ct. (Bean)*, 96 F.3d 1126, 1128, 1129-31 (1996) (applying *Morales* to find no procedural default when state habeas petition was filed nine months after *Clark* became final).[1] Jackson's federal habeas claims of ineffective assistance of counsel therefore are not procedurally defaulted. We address them now.

INEFFECTIVE ASSISTANCE: GUILT PHASE

Jackson raises many claims of ineffective assistance during the guilt phase, but the primary contentions may be grouped into five general categories: (1) failure to investigate the circumstances of Jackson's statements at the hospitals; (2) failure to move to suppress those statements; (3) failure to investigate and controvert at trial the statements made by petitioner after the back-up police arrived on the scene; (4) failure to prepare and utilize medical evidence regarding Jackson's lack of premeditation due to his intoxication; and (5) failure to interview and prepare defense witnesses prior to putting them on the stand.

Our standard for reviewing these claims is *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires Jackson to show that his attorney's performance was unreasonable in

[1]In any event, our court has very recently held that, as of April 1996, the California Supreme Court had not made it clear that its denials for untimeliness involved no decision of federal constitutional law. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at * 4 (9th Cir. Apr. 24, 2000). Accordingly, the 1993 untimeliness ruling against Jackson would not constitute an independent state ground that would procedurally default his claims. *See id.*

light of prevailing professional norms, *see id.* at 687-88, *and* that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[2] *Id.* at 694. We review de novo the district court's determination that Jackson has failed to meet the *Strickland* requirements. *See Johnson v. Baldwin*, 114 F.3d 835, 838 (9th Cir. 1997).

1. *Investigation of Hospital Statements.*

Jackson asserts that his counsel utterly failed to investigate the circumstances of his damaging hospital statements, which collectively indicated that Jackson recollected killing a policeman with a shotgun. Counsel never had his investigator look into those circumstances, because the investigator was never told the statements had been made. Jackson contends that a proper investigation might have revealed that police or hospital personnel had revealed to Jackson that he had been arrested for shooting a policeman with a shotgun.

We assume for purposes of decision that counsel's failure fell below the *Strickland* standard of competence.[3] Jackson, however, has wholly failed to show that a proper investigation would have revealed any such sources for Jackson's information. No evidence was offered in district court that anyone among the police or hospital staffs referred to the nature of

[2]We reject the State's contention that, in addition to the *Strickland* requirement of prejudice, we also must conduct a standard harmless-error review of any *Strickland* violations. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993). The *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error review. *See Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

[3]We need not decide whether counsel's performance was deficient when the claim of ineffectiveness may be rejected for lack of prejudice. *See Strickland*, 466 U.S. at 697.

the incident within Jackson's hearing. Jackson therefore fails to meet the prejudice requirement of *Strickland*.

Jackson invokes *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988), in which this court held that a defense counsel's failure to secure a timely mental examination of the defendant was prejudicial because it prevented a physician at a later resentencing from testifying with reasonable medical certainty to the defendant's mental illness at the time of the crime. *See id.* at 638-39. In *Evans*, however, we relied upon substantial evidence to show that the defendant *had* in fact been mentally diseased at the time of the crime. *See id.* Here, we have only speculation concerning the possibility that someone informed Jackson, after the event but prior to his statements, that he had been arrested for shooting a policeman with a shotgun. To find prejudice on this record would be to presume prejudice solely from counsel's deficient performance, which *Strickland* says we may not do. *See Strickland*, 466 U.S. at 693.

2. *Failure to Move to Suppress Hospital Statements.*

The district court held, and we agree, that counsel's failure to challenge Jackson's first and third statements on *Miranda* grounds did not constitute deficient performance. It is true that Jackson was not long out of his comatose condition when he made the first statement: "Why am I under arrest? Are you charging me with killing a cop?" All of the evidence regarding that statement, however, indicated that it was volunteered and was not a response to any question or assertion. As a spontaneous statement, it would not have been excludable under *Miranda*. *See Oregon v. Elstad*, 470 U.S. 298, 312-14 (1985).

Jackson's third hospital statement was made the day after his arrest, after he had been informed of his *Miranda* rights. Jackson recognized his interrogators as "the cops who say I killed that officer with a shotgun," when the officers had previously said nothing about a shotgun. There is no evidence

that Jackson was impaired at the time, and there is evidence that he was not. There is no evidence of coercion or other improper tactics by the police. Jackson's counsel accordingly had no grounds for moving to suppress the statement, and his decision not to make such a motion does not constitute deficient performance.

Counsel might have had grounds under *Miranda*, however, to challenge Jackson's second hospital statements, made after he had been advised of his rights and told that he had been arrested for murder: "I killed a policeman?" and "I didn't kill that policeman." We assume, therefore, for purposes of decision that the failure to suppress these statements fell below the *Strickland* standard of competent performance. In light of the admissibility of Jackson's first and third hospital statements, however, there is no reasonable probability that exclusion of the second statements would have changed the result of the trial.[4]

3. *Failure to Investigate and Controvert Jackson's Pre-Arrest Statements.*

Jackson's contention that counsel failed to investigate his statements made in the presence of the back-up police focus primarily on one statement testified to by Officer Mohler: "Now I'm going to kill all the fucking pigs." There is no question that the statement was damaging to Jackson; it constituted evidence both of conscious awareness and of the fact, essential to the jury's finding of special circumstance, that Jackson knew he had shot a police officer. Jackson contends that, because no other witness testified to hearing the statement, it was deficient performance and prejudicial for his

[4]Indeed, with the first and third statements in evidence, counsel may have made a reasonable choice in attempting to make the statements work in Jackson's favor because they were phrased as questions, implying that Jackson did not remember the incident. If counsel's choice was a reasonable tactical one, his performance was not deficient. *See Strickland*, 466 U.S. at 690.

counsel not to have interviewed those witnesses and made more at the trial of the fact that no one other than Officer Mohler had heard the statement.

Jackson's counsel had told his investigator to interview every witness whose statement appeared in the "murder book" assembled by the State and provided to counsel. The investigator knew that he would have difficulty obtaining consent of the police officers, and he succeeded in interviewing none of them. Their refusal to be interviewed cannot be attributed to a fault of Jackson's counsel.

We assume for purposes of decision that counsel was deficient in failing to interview the civilian witnesses regarding the statement but, again, Jackson has not demonstrated prejudice. The other officer nearest to Jackson at the time of the statement testified on cross-examination that he had not heard a reference to "pigs." Jackson's counsel did not exploit this difference, but the prosecutor in final argument noted that Officer Mohler had heard the statement but the other officer had not. Jackson's counsel also did not quiz Officer Mohler on the difference between his written statement, which said that Jackson had "yelled" the words, and his testimony that Jackson had "said" the words. Counsel did elicit from Officer Mohler that he had been 70 feet away from Jackson when Jackson "said" the words.

We conclude that any deficiencies of counsel in regard to the statement would not give rise to a reasonable probability of a change in the result if they had been cured. Officer Mohler's testimony itself was not shaken, and he was directly facing Jackson at the time of the statement. As for the civilian witnesses, Jackson did not show in district court that any of them were in a position to hear what Jackson said; no such witnesses testified in the matter. We conclude that *Strickland* prejudice has not been shown.

4. *Failure to Prepare and Present Medical Evidence.*

One of the more difficult issues raised by Jackson is his contention that his counsel was professionally deficient in his presentation, or non-presentation, of medical evidence. There is no question that medical evidence was crucial; Jackson had shot Officer Wrede in the presence of a number of witnesses and there was no disputing the deed. The only question for the jury concerned Jackson's mental state.

Counsel did secure the services of two psychiatrists who interviewed Jackson, and a third who did not but who testified regarding the toxic qualities of PCP. The first two psychiatrists never testified, however. Counsel had instructed both of them identically, to determine, among other things, whether Jackson had the mental capacity to form a specific intent, to deliberate or premeditate, or to harbor malice. Counsel did not ask the psychiatrists to investigate Jackson's background, but both did.

The first psychiatrist, Dr. Skrdla, furnished an opinion nine days after his appointment. Apparently to counsel's surprise, Dr. Skrdla did discuss Jackson's background, including his dishonorable discharge from the army, four armed robberies committed when he was 15 or 16 years of age, and various other matters. Dr. Skrdla opined that Jackson showed no evidence of organic brain disease or functional psychosis, and that he was competent to stand trial. Dr. Skrdla further opined that Jackson was intoxicated but legally sane at the time of the offense. He stated that Jackson was "believed to have possessed the mental capacity to form the specific intent to kill, and actually formed such intent." Dr. Skrdla further stated, however, that "[b]ecause of his drug induced state of intoxication, he is not believed to have actually deliberated, premeditated, nor meaningfully and maturely reflected upon the gravity of his contemplated acts. However, he is believed to have been capable of harboring malice aforethought."

[1] This opinion was clearly a mixed bag, and Jackson's counsel testified in district court that he did not want to put Dr. Skrdla on the stand because he was not willing to concede that Jackson was capable of forming, and did form, the specific intent to kill. He also did not want to risk opening the door to the background information. This decision is clearly a judgment call within the range of competent counsel. Indeed, the district court ruled that Jackson had not raised the issue of his counsel's failure to utilize Dr. Skrdla at the trial. As Jackson now argues the matter, the importance of Dr. Skrdla's report is that it was delivered to counsel four months before Dr. Mead's report, which also went into Jackson's background. If counsel wanted to avoid inclusion of background material, according to Jackson, counsel should have warned Dr. Mead not to include any.

Counsel did not so advise Dr. Mead, however, and his report did include background information. Dr. Mead listed four brief opinions:

> 1) At the time of the commission of the alleged offense, Mr. Jackson was sane.
>
> 2) Mr. Jackson is able to understand the nature and purpose of the proceedings against him.
>
> 3) He is able to cooperate in a rational manner with counsel in presenting a defense.
>
> 4) At the time of the commission of the alleged offense, Mr. Jackson was grossly intoxicated with PCP. He has little recollection of the day's proceedings.

In the remainder of his report, Dr. Mead discussed Jackson's background, including his mother's statement that Jackson began sniffing glue at age 14 and thereafter "became his own worst enemy." He also reported that Jackson "states that he

had never shot a shot gun and could not imagine his ever doing so," and that Jackson "wished he could have a Sodium Amytal interview because he held on to the idea that he would not have ever killed anyone." Jackson had had "several 'bad trips' on PCP and remembers at one time feeling that the house was charged with electricity." Jackson was in a fight in the military that resulted in his losing consciousness; he could not remember ever losing consciousness again until the time of the offense. He showed no signs of major mental illness; "[a]ny psychiatric diagnosis would be within the realm of character pathology."

[2] Jackson's counsel decided that several items in the background material would be prejudicial if Dr. Mead testified and the report had to be handed over to the prosecution. Included were the facts that: Jackson had been using PCP regularly, and had had "bad trips," but had not lost consciousness; he had "remembered" a bad trip when he thought the house was charged with electricity; and that he had come to believe that the police were picking on him. Counsel also feared that the reference to "character pathology" would open the door to other adverse information. Counsel therefore made a motion in limine, asking the trial court to exclude all background matters in the report from being delivered to the prosecution and from being the subject of cross-examination of Dr. Mead. The court denied the motion (at least partly because counsel would not show the report to the prosecution at the time of the motion), and as a consequence counsel elected not to call Dr. Mead.

[3] Again, counsel's decision would appear to be a judgment call within the range of decisions falling within *Strickland*'s standard of competent counsel. The adverse portions of the report can reasonably be seen as damaging to Jackson. Jackson insists, however, that the ineffectiveness of counsel consists in his not having Dr. Mead limit his report. It is not at all clear, however, that Dr. Mead would thus escape having

to respond concerning all of the information that he had used to form his expert opinions. *See* Cal. Evid. Code §§ 801-804.

[4] Nor is it clear that Dr. Mead's favorable testimony would have created a reasonable probability of a different result. On voir dire for the motion in limine, Dr. Mead, after stating that Jackson was "under the influence of PCP at the time he was arrested," responded as follows to Jackson's counsel:

> Q: . . . Did you also, after taking into consideration your interviews with Mr. Jackson, and the arrest reports, have an opinion as to whether Mr. Jackson, on August 31, 1983, was conscious or basically knew what was going on?
>
> Did he remember the events of August 31, 1983?
>
> A: In my opinion he did not have a full memory of what occurred that day.

Although this testimony would have helped Jackson, it is limited in scope and probable effect. There is no basis for concluding that Dr. Mead would have been more helpful, because he was not a witness in the evidentiary hearing in district court.

[5] The decision not to call Dr. Mead to testify left Jackson without the testimony of any psychiatrist who had examined him — far from a desirable situation when the sole defense concerns Jackson's state of mind. There is an evidentiary problem, however, that overhangs all of counsel's decisions concerning expert testimony. California Penal Code § 29 provides:[5]

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[5]Section 29 was originally enacted in 1981 and has undergone minor amendments that do not affect our analysis. *See People v. Saille*, 54 Cal. 3d 1103, 1111 n.5, 820 P.2d 588, 593 n.5 (1991).

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Jackson's counsel believed that section 29 applied to impairment by voluntary intoxication, and would prevent him from eliciting Dr. Mead's (or any other medical expert's) opinion that Jackson in fact had not premeditated. Counsel was not wrong in so concluding. Although the California Supreme Court avoided ruling on the point in *People v. Breaux*, 1 Cal. 4th 281, 303, 821 P.2d 585, 596 (1991), section 29 since has been interpreted to preclude expert testimony that a defendant in fact did not premeditate. *See People v. Rangel*, 11 Cal. App. 4th 291, 302-03, 14 Cal. Rptr. 2d 529, 536 (1992). The inability of Dr. Mead to testify directly on premeditation decreased the value of his possible contribution, although he would not have been precluded from testifying regarding Jackson's condition at the time of the offense. In all, counsel's decision not to call Dr. Mead was within his permissible realm of professional judgment.

Counsel's means of avoiding the problem posed by Cal. Penal Code § 29 was to rely on hypothetical questions posed to Dr. Aniline, the one medical expert who did testify. Dr. Aniline had not examined Jackson, but was a highly qualified expert on the effects of PCP. He was Ward Chief in Psychiatry at Los Angeles County Medical Center. He had been furnished with the "murder book," toxicological reports, and with daily transcripts of the trial testimony.

Dr. Aniline explained that PCP had once been used as an anesthetic, and that a first-time user with Jackson's blood

level of PCP would be unconscious. A chronic user could tolerate much higher levels, but because PCP is stored in the body, a small amount could "set off" a chronic user. Dr. Aniline stressed the unpredictability of the effects of PCP, and testified that PCP intoxication is unique in that it "is very often associated with partial memory states, meaning, that some things are remembered and other things are not, even though an individual may be behaving, let's say in somewhat normal patterns, they can eat, sleep, deal with things socially or go through many known behaviors." Dr. Aniline stated that PCP users may seem to be alert and aware, but "they may not be responding or processing information around them . . . the way they would normally. . . . They are not asleep or comatose. But they are not entirely aware of what is going on around them."

Jackson's counsel asked Dr. Aniline a hypothetical that included virtually all of the evidence of Jackson's actions leading up to and including the shooting and arrest, and Dr. Aniline opined that the person so acting and acted upon was intoxicated by PCP. Then, assuming the same facts, counsel asked Dr. Aniline whether the person involved could deliberate before shooting. Dr. Aniline answered: "I don't know if he deliberated before or not. I think from the information that I have been presented, I would say that some of his ability to think is going to be impaired. And deliberation is part of that. . . . I think from my point of view in my opinion, there would be impairment of the ability to do that. Whether he did that or not, per se, I can't say."

Dr. Aniline was cross-examined on the fact that he had not interviewed or examined Jackson. Jackson argues here that the failure to arrange such an interview or examination is a failure of effectiveness on the part of his trial counsel.[6] Coun-

[6]The State argues that Jackson neither properly exhausted this issue nor raised it in his federal habeas petition. Our disposition of the issue makes it unnecessary for us to address that point.

sel's original letter to Dr. Aniline, however, told Dr. Aniline that he was not sure whether it would be advantageous to interview Jackson because he does not remember the incident, and that he would appreciate Dr. Aniline's view on the matter.[7] Dr. Aniline did not ask to interview Jackson, perhaps because he assumed that there would be other, examining psychiatrists testifying.

[6] Counsel is not required to dictate what his experts in their professional judgment need to do to render proper professional services. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995). Moreover, because experts may not testify directly that a defendant did not premeditate, it was a reasonable professional judgment to choose instead to emphasize the effects of PCP generally on the mental processes. Even if we assume, however, that counsel was ineffective in not having Dr. Aniline examine Jackson, there is not a reasonable probability that the result would have been different if the examination had occurred. Dr. Aniline extensively examined Jackson before the evidentiary hearing in district court, and testified to a 95% certainty that he lacked the capacity to deliberate. He also testified that the lack of capacity could have been determined to a 90% degree of certainty at the time of Jackson's trial.[8] But on cross-examination, Dr. Aniline conceded that if Jackson went to the car to get the shotgun, that could be an example of premeditation, and it would be rational to infer so. Similarly with regard to Jackson's putting his head down on the roof of the car and then waiting to shoot until Wrede had relaxed his guard: Dr. Aniline agreed that "[i]f he put his hand [sic] down and therefore maybe even

[7]Jackson contends that his counsel instructed Dr. Aniline not to interview Jackson. The district court found to the contrary, however, and that finding is not clearly erroneous.

[8]This evidence of Dr. Aniline was introduced in district court in support of Jackson's free-standing claim of actual innocence, which we discuss later in the opinion. The evidence does suggest, however, the most that could have been gained from an interview with Jackson by Dr. Aniline.

elicited unguarded response and then afterwards, after eliciting the unguarded response, fired, that would show considerable thought." When asked if such behavior would show deliberation, Dr. Aniline answered, "The way we just framed the last sentence, it would." Similarly, he stated that announcing an intention to use a gun showed premeditation. In the light of these and several similar answers, there is no reasonable probability that an examination of Jackson by Dr. Aniline would have changed the outcome of the trial.

[7] We conclude, therefore, that Jackson has failed to show deficient performance and resulting prejudice, within the meaning of *Strickland*, in counsel's preparation and presentation of expert medical testimony in the guilt phase of Jackson's trial.

5. *Failure to Interview Witnesses.*

Jackson's counsel asked his investigator to interview all of the witnesses who were listed in the murder book. As we have said already, the investigator did not succeed in interviewing many of those witnesses. Jackson complains that it was ineffective assistance for his counsel to call as defense witnesses persons that he had not interviewed. We assume that it ordinarily falls below the *Strickland* level of required competence to put a witness on the stand without interviewing him. We look then to the question of prejudice.

The instance that Jackson presents as most damaging was his counsel's calling of Adrian Mitchell as the first defense witness. Adrian was 12 years old and his mother had said that he was too upset by the incident for her to allow him to be interviewed. His statement was in the murder book. Counsel on direct examination elicited from Mitchell that Jackson had been acting irrationally just before the encounter with Officer Wrede—that he had been walking erratically, jumping, and diving onto the ground.

On cross-examination and after some disjointed testimony, Mitchell said that he had seen the shooting. Jackson's counsel objected on the ground that the cross-examination was going beyond the scope of the direct examination, but the objection was overruled. Mitchell then testified that, after Jackson got the shotgun, Officer Wrede asked him to put the gun down and Jackson had put it down on the roof. Then Officer Wrede walked around the back of the car, put his gun down on the trunk of the car, and then put his hand up. Jackson then shot the officer. No other witness had testified that Officer Wrede had put his gun down before being shot.

On re-direct examination, Jackson's counsel elicited that Mitchell had not actually heard Officer Wrede ask Jackson to put his gun down; he had merely assumed it. Mitchell also responded that he had told the interviewing officer (who was in the courtroom) what he had just described. Mitchell's statement in the murder book, however, simply stated that Mitchell had shot the officer. Jackson's counsel made no attempt to impeach Mitchell with the statement.

If Mitchell's account had been the only one in evidence, prejudice might have been established. There were several accounts of the shooting, however. By far the most detailed was that of Rob Dunham, who was stopped in his car 45 feet from the police car at the time of the shooting, with nothing obstructing his view. He testified that, after the officer said something that Dunham could not hear, Jackson put his gun down on the top of the car, but kept his hand on it. He also put his head down, although not down flat on the roof. Officer Wrede then took a step to go around the car, turning his gun away from Jackson. Jackson then picked up the shotgun and shot the officer.

Other witnesses described the shooting in much briefer fashion, but none of them stated that the officer laid his gun down and put up his empty hand. In final argument, the prosecutor mentioned Adrian Mitchell, but argued the facts as pre-

sented by Rob Dunham. The prosecutor contended that Jackson chose the moment to shoot the officer because the officer has "got the gun pointed at a different direction than at my head." There is no reasonable probability that the jury relied on Adrian Mitchell's aberrant testimony at all, much less having relied on it to convict when they would not otherwise have done so.

We similarly find no *Strickland* prejudice from testimony of defense witnesses Downs and Shelton, both of whom testified to irrational behavior by Jackson. Downs stated that, when Officer Wrede asked Jackson his name, Jackson answered that it was "none of his fucking business." Shelton testified that Jackson had responded angrily, assuming a karate stance when asked for identification. Neither comment looms large in the trial in light of all of the other evidence of Jackson's irrational behavior and his free use of coarse language. We conclude that there has been no *Strickland* prejudice.

6. *Cumulative Ineffectiveness and Prejudice.*

Finally, we reject Jackson's contention that the cumulative effect of his counsel's errors deprived him of effective assistance. In so holding, we consider all of the errors of counsel urged by Jackson, whether we have discussed them or not. Even when they are cumulated, any failures of counsel do not create a reasonable probability that, but for the cumulative effect of the errors, the result would have been different. It is true that counsel's defense in the guilt phase was not highly spirited and focused, but for the most part it did not fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. With regard to those actions that we assume were outside the permissible range, there was no showing of prejudice within the *Strickland* standard.

We recognize that premeditation is always arguable when a homicide results from an unplanned encounter involving an

accused who was grossly intoxicated. The prosecution, however, presented a persuasive case that Jackson had to reason deliberately in: choosing his first weapon, tree stakes; then pursuing Officer Wrede to his car to select a more destructive weapon; releasing the shotgun's slide action, cocking the weapon and firing it when Officer Wrede had turned aside; threatening other officers with the weapon; and in reaching for another officer's weapon during the arrest struggle. There is not a reasonable probability that, but for counsel's deficiencies, the jury would not have convicted of first-degree murder. We therefore affirm the ruling of the district court upholding Jackson's conviction.

INEFFECTIVE ASSISTANCE: PENALTY PHASE

[8] Counsel testified in district court that he never expected Jackson's trial to reach the penalty phase, and his preparation reflected that view. The total investigation for purposes of the penalty phase took less than two hours some weeks before the trial began. It consisted of an interview by counsel's investigator with Jackson's mother and his estranged wife. Counsel also spoke briefly to those two witnesses on the day that they testified in the penalty phase. He also reviewed Jackson's juvenile and military records. With that minimal preparation, Jackson's counsel began the first and only penalty phase he had ever tried, only four days after the verdict had been rendered. Counsel testified in district court that he did not ask for a continuance because he had no further investigation to do. In so failing to prepare and investigate for a penalty defense, counsel clearly fell below the requisite standard of competence. *See Williams v. Taylor*, 2000 WL 385369, *17 (U.S. Apr. 18, 2000).

The defense case in mitigation consisted of the testimony of Jackson's wife and his mother. His wife testified that she had left Jackson because he was using drugs and couldn't handle it. She stated that Jackson had arranged to take their children to the park later in the day of the shooting. She said

that Jackson was a good provider when he was working, and a good husband except for the drug use. He loved and got along well with the children. She related the incident when he believed that the house was charged with electricity. She felt that the verdict was unfair in light of Jackson's intoxication. On cross-examination, she said that she was aware of his dishonorable discharge from the army and his prison term for burglary. On redirect examination, counsel asked if Jackson was a private person. She answered "yes," and added: "he didn't care about other people's problems. He wasn't interested. He wasn't the type of person that would want to know what was going on in somebody else's life. If it didn't have nothing to do with him, then he wasn't concerned about it."

Jackson's mother testified that Jackson's father was a hustler who was not around and did not care about Jackson. Jackson started sniffing glue at age 14, and that is when his problems started. Jackson's mother never had trouble with Jackson in school. He won trophies in sports. She felt that Jackson was sick and she suggested help, but he said nothing was wrong with him. She was shocked at the verdict because the act seemed so clearly drug-related. On cross-examination, Jackson's mother admitted that Jackson had spent his tenth grade in custody because of a robbery. She was also aware of a later burglary where a person with him had a gun.

[9] The testimony of the two defense witnesses covered less than 30 pages of trial transcript. No attempt was made to compile a social history of Jackson, to indicate the conditions in which he had been brought up and lived. There was expert testimony at the evidentiary hearing in district court that a major part of competent counsel's duty at the penalty phase is to prepare and present such a history. Jackson's counsel did not investigate or prepare evidence regarding Jackson's addiction to PCP and the meaning and consequences of such addiction.

[10] The defense presented no medical testimony during the penalty phase. Counsel testified in district court that it

would not have helped to have Dr. Mead testify that Jackson was grossly intoxicated and had little recollection because "the guilt phase is over." This explanation is wholly insufficient. "Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase." *Hendricks*, 70 F.3d at 1043; *see* Cal. Penal Code § 190.3(k) (trier of fact at penalty phase shall take account of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime").

[11] Certainly one of the primary factors to be considered in mitigation was the clouded mental condition of Jackson caused by drug intoxication. Yet, because of the difficulties Jackson's counsel had with his medical expert testimony in the guilt phase, the jury had never heard from any medical expert who had examined Jackson or who could testify concerning Jackson's actual condition at the time of the crime. One of the constraints operating on counsel in the guilt phase had been Cal. Penal Code § 29, which prevented expert testimony concerning "whether the defendant had or did not have the required mental state[ ] . . . for the crimes charged." But section 29 by its own terms is limited to "the guilt phase of a criminal action." *Id.* It did not constrain such testimony at the penalty phase. In district court counsel stated that at the penalty phase he still found harmful material in Dr. Mead's report, but he could not identify harmful material that was not already available to the prosecution. When he made a motion in limine concerning Dr. Mead's report during the guilt phase, counsel had told the court that Dr. Mead's report contained background information "which basically is going to be used in case we get in a penalty phase" but which is inappropriate for the guilt phase. Then, when counsel got to the penalty phase, he declined to have Dr. Mead testify because of the very material that counsel had earlier said he would introduce at the penalty phase!

Counsel did not compensate for his failure to employ Dr. Mead at the penalty phase by having Dr. Aniline examine

Jackson so that he could testify in mitigation. Instead, nothing was done and the penalty phase was left without any expert evidence at all concerning one of the most important factors in mitigation — Jackson's clearly impaired mental condition at the time of the crime.

[12] Counsel did not conduct any investigation at all into an act of aggravation of which he had notice — an alleged sodomy committed by Jackson when he was in the army. Although Jackson told his counsel that the incident had not occurred as reported, counsel did not investigate or interview the victim prior to the victim's testimony in the penalty phase. The testimony left room for argument that the sodomy committed by Jackson had not been committed by force or threat of force, which was a requisite for admissibility. *See* Cal. Penal Code § 190.3. Yet Jackson's counsel made no motion in limine, and no objection to the testimony.

[13] We have no doubt that counsel's deficiencies at the penalty phase were prejudicial. The declaration of Dr. Jackman in the district court indicates some of the mitigating matter that could and should have been presented as a part of Jackson's social history. It recites that Jackson suffered repeated beatings in childhood, and that his mother choked him when angry with him. Jackson's childhood and adolescence were characterized by neglect and instability. It notes that Jackson exhibited signs of mental illness in childhood and was diagnosed at one time as schizophrenic. In all, Dr. Jackman's report presents a very different picture of Jackson than any the jury was allowed to consider.

[14] We conclude that the utter failure to present medical evidence was prejudicial as well. *See Bean v. Calderon*, 163 F.3d 1073, 1080-81 (9th Cir. 1998) (presentation of medical experts without preparation and foundation prejudicial at penalty phase), *cert. denied*, 120 S. Ct. 285 (1999). Dr. Mead's report indicates that he was prepared to testify that Jackson could remember little of the incident. Dr. Aniline, whose testi-

mony in the district court was introduced as part of the "actual innocence" claim that we discuss below, testified that it could have been established to a 90% medical certainty in 1983 that Jackson was unable to think consciously at the time of the crime. Certainly medical testimony would have been available that Jackson's ability to think was grossly impaired.

[15] The State argues that some of the evidence now relied on by Jackson cannot be accepted at face value, that declarations of family members controvert some of the family history that Jackson contends should have been presented. The State is correct that, because Dr. Jackman did not testify, the State has not had a chance to test his statement by cross-examination. *See Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000). But Jackson's mother in her deposition admitted hitting Jackson with "whatever I had in my hand," and that she choked him more than five but less than ten times. She said she did not choke him into unconsciousness, but that "His head is bobbing. I thought a couple of times maybe his tongue was out, and that is when I would have stopped." This evidence, alone, presents a very different picture from her testimony at the penalty phase. And with medical evidence, the jury would have been presented with a different medical picture of Jackson's state of consciousness than the one they received, which was no picture at all. Dr. Aniline presented evidence in district court indicating the kind of testimony available, and the State had the opportunity to cross-examine him. In sum, the evidence produced at the evidentiary hearing convinces us that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the [penalty] proceeding would have been different." *Strickland*, 466 U.S. at 694. In other words, the probability of a different result is "sufficient to undermine confidence in the outcome." *Id.* That probability of a different result establishes Jackson's right to relief. *See Williams v. Taylor*, 2000 WL 385369 at *16-17.

It is true that there was evidence of premeditation, in the guilt phase, that the jury could consider in the penalty phase.

But the evidence was far from overwhelming; this is one highly unusual murder in the first degree, with an unplanned encounter between a grossly intoxicated, originally unarmed defendant and a victim suddenly ending in death. In determining the degree to which the lack of medical evidence of Jackson's actual impairment and the lack of a social history prejudiced Jackson, we keep in mind the admonition of *Hendricks*:

> The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place. In light of the whole record, and despite the substantial evidence of aggravation, we conclude that the failure of [counsel] to present mitigating evidence rendered the sentencing hearing neither fair nor reliable.

Hendricks, 70 F.3d at 1044; *see also Williams v. Taylor*, 2000 WL 385369 at *17 (evidence of lack of premeditation may affect jury's selection of penalty even if it does not undermine death-eligibility). As in *Hendricks*, we conclude that counsel's failure rendered the verdict of death unreliable, and that the writ must issue invalidating that sentence.

FREE-STANDING CLAIM OF FACTUAL INNOCENCE

Much of the testimony and argument in the district court was directed toward establishing a "free-standing" claim of "actual innocence" for Jackson. The State contends that actual innocence is not a permissible ground for issuing a writ of habeas corpus, citing the discussion in *Herrera v. Collins*, 506 U.S. 390, 398-408 (1993). The majority opinion in *Herrera*,

however, assumed for purposes of decision that "a truly persuasive" demonstration of actual innocence would render the execution of a defendant unconstitutional, but that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* at 417. As we have noted, however, a majority of the Justices in *Herrera* would have supported a claim of free-standing actual innocence. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). We also held that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.*

The petitioner in *Carriger* contended, however, that he had not committed any crime against the victim; Jackson contends only that he could not have premeditated or specifically intended to kill Officer Wrede. Even if we assume, without deciding, that a free-standing claim of innocence may be maintained in such circumstances, we conclude that Jackson has not made the necessary showing. Jackson has certainly cast doubt on his conviction by Dr. Aniline's testimony that, to a 95% medical certainty, Jackson could not have premeditated or specifically intended to kill. But other testimony of Dr. Aniline, both at trial and in the evidentiary hearing, shows that the effects of PCP on any particular user are unpredictable, that the effects wax and wane during intoxication, and that rational persons could interpret some of Jackson's actions (described above in our discussion of the guilt phase) as showing premeditation. Dr. Baselt testified at the evidentiary hearing that a person with a level of 176 nanograms per milliliter of blood would not necessarily be unable to process thought, premeditate, deliberate and intend to kill. Dr. Aniline's testimony, considered in full, does not directly counter or qualify this conclusion. There is no showing that a court-appointed neurologist would be able to eliminate the effect of Dr. Baselt's testimony, and the district court consequently did not abuse its discretion in failing to appoint such a neurologist. *See United States v. Nelson*, 137 F.3d 1094, 1101 n.2

(9th Cir.) (denial of appointment of expert reviewed for abuse of discretion), *cert. denied*, 525 U.S. 901 (1998).

The positron emission tomography (PET scan) evidence also provides little support for Jackson's claim. The State's expert testified at the hearing that the use of PET scans to diagnose chronic PCP abuse is not generally accepted by the scientific community, and this testimony was not refuted. The district court was accordingly entitled to disregard the evidence.[9] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993). In addition, Jackson's PET scan is susceptible to conflicting interpretations, and its importance is unclear. No evidence was introduced that the PET scan proves that Jackson was unable to premeditate or form a specific intent at the time of the shooting. The PET scan evidence could, at best, only establish that Jackson suffered some PCP-induced brain abnormality, the effect of which on Jackson's capacity for higher thought is not demonstrated. The PET scan, by itself or in combination with the other evidence offered by Jackson, fails to make the required showing of probable innocence, which "contemplates a stronger showing than insufficiency of the evidence to convict." *Carriger*, 132 F.3d at 476. Jackson's free-standing claim of actual innocence consequently fails.

CONCLUSION

Jackson has failed to demonstrate that he was prejudiced by ineffective assistance of counsel at the guilt phase of his trial. We therefore affirm the district court's denial of a writ of habeas corpus to overturn his conviction. We also affirm the district court's rejection of Jackson's free-standing claim of actual innocence.

We conclude, however, that Jackson has demonstrated ineffective assistance of counsel at the penalty phase of his trial,

[9]We find no abuse of discretion by the district court in refusing to allow Dr. Buchsbaum to testify in rebuttal on the PET scan issue.

and has shown that counsel's ineffectiveness created a reasonable probability that, but for counsel's errors, the death penalty would not have been imposed. We accordingly reverse the district court's denial of a writ of habeas corpus with regard to the penalty, and we remand this matter to the district court with instructions to issue a writ invalidating Jackson's death penalty as now imposed.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED with instructions.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's affirmance of Jackson's conviction for first degree murder. I also concur in the court's denial of Jackson's actual innocence claim. The court's reliance on speculation regarding the effect of additional evidence to overturn Jackson's sentence, however, forces me to dissent from that portion of its opinion.

I

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court instructed us on how to evaluate claims of ineffective assistance of counsel. Although the majority follows *Strickland*'s analytical framework, it fails to apply its command that "every effort be made to eliminate the distorting effects of hindsight" and that our review of the decisions of trial counsel be "highly deferential." *Id.* at 689. Only by doing so can we remain true to the Court's teaching that in order to set aside his sentence Jackson must show that his trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [him] by the Sixth Amendment." *Id.* at 687.

The majority takes Jackson's trial counsel to task for the following sins of omission. First, the majority chides counsel for not introducing evidence regarding Jackson's childhood experience of beatings, neglect and possible mental illness. Second, the majority asserts that at the penalty stage, trial counsel's failure to introduce evidence regarding the effects of phencyclidine (PCP) on Jackson's ability to reason and premeditate prejudiced Jackson. We may not overturn his sentence, however, unless his counsel's representation fell outside of "the wide range of reasonable conduct" and unless any errors created the "reasonable probability of a different result." *Id.* at 694. At best, Jackson's arguments convince me only that the additional evidence might have had "some conceivable effect of the outcome of the proceeding," a standard which the Court expressly held, "is not enough." *Id.* at 693.[1]

II

The majority contends first that trial counsel did not present adequate evidence of Jackson's social history. Specifically, the majority points to evidence that Jackson suffered repeated beatings as a child, that his mother choked him several times, that his childhood was characterized by neglect and instability, and that Jackson exhibited signs of mental illness in childhood and was diagnosed at one time as schizophrenic.

The majority relies on representations in the declarations of various family members and friends. These individuals did not testify at the evidentiary hearing before the district court, and the State was thus deprived of its opportunity to cross-examine them. Apparently the majority is little bothered by

[1]The majority also alleges other errors by trial counsel—the length of the investigation and failure to investigate the circumstances surrounding the sodomy Jackson committed while in the military. The majority's failure to explain how these actions prejudiced Jackson renders these arguments little more than makeweight. If Jackson cannot show prejudice, he has not established a violation of his right to counsel.

the lack of cross examination, the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970). In addition, those declarations were controverted by the declarations of others who asserted that they had never witnessed any abuse and that Jackson had been a happy child.

A

Putting that troubling matter aside, the majority stunningly asserts that it is enough that Jackson's mother had stated in her deposition, but did not testify at trial, that she hit Jackson and choked him five to ten times. At the penalty phase of the trial, the jury heard from Jackson's mother who testified that his father was "a hustler, gambler, a street person," who was never around and did not care about his son. Trial counsel's decision not to introduce additional evidence of his mother's disciplining him was not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In fact, it might have undermined her role at the penalty stage as a sympathetic mother pleading for mercy for her son.

If there were additional evidence of abuse, trial counsel cannot be faulted for failing to churn it up. "[T]he 'reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.' " *Langford v. Day*, 110 F.3d 1380, 1386-87 (9th Cir. 1996) (quoting *Strickland*, 466 U.S. at 691). Today, Jackson appears more than willing to help his attorneys prepare for his defense, but in order to eliminate the distorting effects of hindsight, we must look at the reasonableness of counsel's conduct in light of the information he knew at the time of trial. When counsel interviewed Jackson at that time, Jackson gave him no leads at all. He pointed him only to his mother and wife, whom trial counsel did interview. Although now Jackson and the majority fault counsel for not putting forth additional proof of a difficult childhood, at the time, Jackson

gave him no indication that his youth had been marred by beatings and neglect. *See Strickland*, 466 U.S. at 691 ("And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). In addition, when interviewed Jackson's wife reported that Jackson and his mother had a good, affectionate relationship. She stated Jackson had never told her that he felt he had been abused as a child, or even complained about his childhood. Counsel had little reason to search out evidence of abuse.

Even assuming error in trial counsel's decision not to put forth more evidence of harsh discipline, there is no reasonable probability that evidence of several chokings and beatings during childhood would have swayed the jury. When Jackson's attorney interviewed his wife, she reported to him that her husband had a close relationship with his mother. This would have cast doubt on the significance of any lasting impact of the beatings and their now purported effect on his murder of the police officer. The jury had already decided that Jackson had deliberately murdered a police officer, they knew that Jackson had been abandoned by his father, but they also knew he had a good relationship with his mother. Only by sheer speculation can the majority conclude that evidence that his mother disciplined him by hitting him would have changed the jury's verdict.

B

As for the evidence that Jackson may have shown signs of mental illness as a youth, trial counsel had Jackson evaluated by two doctors who stated that he did not show any signs of mental illness at the time of trial. The two electroencephalograms showed no abnormalities. An attorney may reasonably rely on the reports of expert witnesses whom he hires to advise him. *See Morgan v. Bunnell*, 24 F.3d 49, 52 (9th Cir. 1994). In determining whether Jackson's counsel acted within

the wide range of professional judgment, we must focus on the reasonableness of the attorney's actions in light of what he was told by the experts. An attorney who hires two expert psychologists who in turn inform him that his client suffers from no mental illness acts reasonably when he does not pursue evidence that his client may have exhibited signs of mental illness as a child, particularly when the only indication of this was a juvenile record from thirteen years earlier.

Jackson has also failed to show prejudice. Considering the two expert conclusions of no mental illness, a report from when Jackson was sixteen revealing that he had been expected to develop stronger schizophrenic tendencies had no "reasonable probability" of changing the outcome of the sentencing proceeding.

III

The next category of evidence the majority faults trial counsel for not introducing is that dealing with the effects of PCP on Jackson's ability to premeditate. The majority concludes that trial counsel should have had Dr. Mead or another expert testify that Jackson was grossly intoxicated at the time of the murder and had little recollection of the events. The trial record demonstrates, however, that such additional testimony as the majority demands had little chance of affecting the decision of the jury, which already had before it evidence both of Jackson's PCP intoxication and of the effects of PCP.

Medical evidence during the guilt phase of the trial established the high level of PCP in Jackson's blood, as well as the presence of amphetamines and cocaine in his urine. The level of PCP was so high that according to defense expert, Dr. Aniline, it would render a first-time user unconscious. Jackson admitted he was a chronic user of PCP and had used PCP the day of the murder. Dr. Aniline testified further that Jackson's behavior at the time of the crime corresponded with PCP

intoxication. Thus the jury knew that Jackson was high on PCP when he murdered the police officer.

The jury also heard at the guilt phase from Dr. Aniline that the effects of PCP are unpredictable, that individuals intoxicated with PCP remember only some things that happen during their high, and that even though they appear alert, they are not in fact entirely aware of what is happening and may not be processing information the way they normally would be. Finally and importantly, Dr. Aniline told the jury that a PCP user in Jackson's state of intoxication would have an impaired ability to think and deliberate, though he could not conclude for certain whether or not Jackson had deliberated. As the district court found, all of this evidence was consistent with trial counsel's strategy to explain how Jackson could have taken the actions he did and still be so intoxicated that his ability to think was impaired. Thus the jury had before it substantial evidence of the effects of PCP on a user's ability to think.

Even if trial counsel were unconstitutionally ineffective for not using an expert witness who had examined Jackson at the penalty stage to testify to Jackson's impaired ability to think, this would not have had a "reasonable probability" of producing a different sentencing outcome. At the penalty phase, the jury may consider all evidence presented at the guilt phase. *See People v. Cummings*, 4 Cal.4th 1233, 1330 (1993) (In Bank). The jury that sentenced Jackson knew that PCP greatly impairs a user's mental condition and knew that Jackson was high on PCP at the time of the crime. Yet, it sentenced him to death. I simply cannot say that there is a reasonable probability that a jury knowing those facts would have come out differently if only an expert had put two and two together. The jurors were quite capable of doing this themselves. Moreover, whatever additional evidence of PCP's effect on the ability to deliberate Jackson's counsel introduced, the jury had before it other evidence of premeditation. Jackson went to the police car, opened the door, grabbed the shotgun, and cocked the gun. There was also evidence that Jackson inten-

tionally caused the officer to drop his guard before shooting him to death.[2] Because of this evidence of premeditation and because the jury effectively had before it the evidence the majority wishes trial counsel had introduced, I cannot conclude that but for counsel's decisions not to introduce the evidence there is a "reasonable probability" that the jury would have given a different sentence.

The evidence demonstrates that the jury was well aware that Jackson's ability to think clearly may well have been impaired when he shot the police officer, but still imposed the death sentence. The majority speculates when it concludes that if an expert who examined Jackson weeks after the murder had told the jurors that Jackson's ability to think at the time of the crime was impaired, there is a reasonable probability that they would not have imposed the death sentence. Perhaps the majority is inclined to the view that Jackson should not have received the death penalty: "[T]he evidence [of premeditation] was far from overwhelming; this is one highly unusual murder in the first degree, with an unplanned encounter between a grossly intoxicated, originally unarmed defendant suddenly ending in death." Supra at 5011. For me, the point is that the jury knew all of that and still sentenced Jackson to death. I cannot usurp the role of the jury in determining the appropriate punishment by supplanting its judgment with my own.

IV

A sentence of death should not be imposed lightly nor without due consideration of all relevant factors. Nor should a federal court of appeals lightly overturn the sentence given by the jury, as well as the reasoned determinations of two state courts and a federal district judge, all of whom affirmed the

[2]At the evidentiary hearing before the district court, Dr. Aniline himself testified that these and other actions by Jackson show deliberation and premeditation.

sentence. Trial counsel's decisions fell well within the wide range of professional conduct and there is no "reasonable probability" that any errors he may have made affected the outcome of the proceeding. Thus, I must dissent from that portion of the opinion vacating Jackson's capital sentence.

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APPENDIX B

ENTERED
CLERK,U.S.DISTRICT COURT
NOV. 14, 1997
CENTRAL DISTRICT OF
OF CALIFORNIA
By "it" DEPUTY

FILED
NOV 14, 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA By "W" DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANTHONY JACKSON, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 91-4249-R **DEATH PENALTY** MEMORANDUM DECISION AND ORDER

Michael Jackson has petitioned the Court for a writ of habeas corpus. Currently before the Court are Claims 1, 3, 4, and 6 of the Amended Petition. Claim 2 was dismissed by order of the Court on September 5, 1995, and claim 5 has been withdrawn from consideration by Jackson. Claims 1 and 3, with the exception of sub-claims 3(H), 3(M), and 3(N), were the subject of an evidentiary hearing.

Having reviewed and considered the state court trial record, the evidence received at the evidentiary hearing, the post-hearing briefs submitted by the parties, the additional briefing on the recent decision in Thompson v. Calderon, 120 F.3d 1045 (9th Cir.) (en banc), cert. granted in part, 118 S.Ct. 14, order amended, 118 S.Ct. 16, (1997),

the papers, pleadings, and records on file herein, [1] and the oral argument of the attorneys, the Court is prepared to rule on all of the claims litigated at the evidentiary hearing, as well as the claims for which an evidentiary hearing was neither requested nor necessary. The Court hereby orders that Claims 1, 3, 4, and 6 are DENIED in their entirety. [2]

I. Factual Background

In 1984, Jackson was convicted of the intentional and premeditated first degree murder of Officer Kenneth Wrede. The prosecution's theory for the element of malice aforethought, making the killing murder, was that

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1. The following abbreviations will be used throughout the order:
Reporter's Transcript of the State Court Trial = RT; Reporter's Transcript of the Evidentiary Hearing held in this court = EHT, volume number, page number; Exhibits for Evidentiary Hearing = EH Exhibit Number; Amended Petition for Writ of Habeas Corpus = Am. Pet .; Petitioner's Post-Hearing Brief = Pet'r Br.; Respondent's Post-Hearing Brief = Resp't Br.; Petitioner's Brief Re: Claims IV, V and VI = Pet'r Supp. Brf.; Deposition Transcript = Dep.; and Narrative Statement = Narr.

2. The Court notes that the Antiterrorism and Effective Death Penalty Act of 1996 does not affect this Court's review of Jackson's federal habeas claims, as his petition was filed prior to the effective date of the act. Lindh v. Murphy, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc) (finding against retroactive application to cases filed before the Act's effective date of April 24, 1996), petition for cert. filed, 66 U.S.L.W. 3157 (U.S. Aug. 11, 1997) (No. 97-289).

Jackson intended to kill Wrede. To justify a conviction of first degree murder, the prosecution contended that Jackson premeditated and deliberated the killing. Jackson's main defense at trial was that he was so excessively intoxicated on PCP that he was unaware of his actions or his surroundings. Jackson's PCP intoxication was medically confirmed, factually undisputed, and consistent with the observations of bystanders.

The jury found true the special circumstance allegation that Wrede was a peace officer who was intentionally killed while engaged in the performance of his duties and that Jackson knew or reasonably should have known that Wrede was a peace officer in the performance of his duties, pursuant to Cal.Penal Code § 190.2(a)(7), thereby rendering Jackson eligible for the death penalty. After a penalty phase trial, the jury rendered a verdict of death.

The following section provides a brief overview of the case. A more detailed exposition can be found in the state supreme court's opinion. People v. Jackson, 49 Cal.3d 1170, 783 P.2d 211, 264 Cal.Rptr. 852 (1989), cert. denied, 498 U.S. 881, 111 S.Ct. 226, 112 L.Ed.2d 181, 112 L.Ed. 181 (1990). The facts relevant to the instant proceedings are developed in further detail in conjunction with the specific claims.

II. Overview of the Crime

On the morning of August 31, 1983, Jackson was at a friend's garage shortly before noon sharing a cigarette dipped in PCP. Shortly thereafter, he suddenly jumped up, kicked off his shoes and sprinted out of the garage. Neighbors noticed him half-undressed, jumping up, falling down, and diving head first into the pavement. Understandably describing his behavior as "very strange," two citizens independently reported the incident to the police.

Informed by a passing motorist of Jackson's odd behavior, Officer Wrede responded to the scene. Observing Jackson's appearance and demeanor, Wrede radioed to the station that Jackson may have been "dusted," i.e., on PCP, and requested back-up assistance. Wrede gave Jackson certain commands. Jackson did not respond, but simply continued ambling around aimlessly. Wrede used his baton to strike Jackson in the back of his legs, apparently in the hope that Jackson would fall to the ground. Instead, the two got into a scuffle. After Wrede separated from Jackson, Jackson went to a nearby yard and, attempting to pull a tree out of the ground, pulled out two supporting stakes (one six feet, the other nine feet). Jackson threw the stakes at Wrede.

Leaving Jackson, Wrede returned to the car and again radioed for help. While Wrede was at the driver's side door, Jackson walked up to the passenger door and reached across the front seat for the shotgun that was still in the rack mounted to the car. After a brief struggle, Jackson ripped the shotgun, including the rack and bolts, out of the car. Jackson and Wrede were on opposite sides of the police car. Wrede was standing near the light bar, which was flashing. After a brief stand-off Wrede lowered his gun. Jackson then discharged the shotgun, killing Wrede. The entire encounter between Wrede and Jackson spanned less than four minutes.

The back-up units arrived at the scene less than a minute after the shooting. Jackson, in a confrontation with the officers, yelled "I'll kill all the pigs." The police released a dog on him and eventually three officers gang-tackled Jackson and subdued him at 12:30 p.m.

Jackson was transported to the police station and by 1:30 p.m. had been moved to the hospital. Medical records described him as incoherent, in shock, and semi-conscious. A urine sample ultimately confirmed what the other physical symptoms suggested, that Jackson was intoxicated on PCP. Jackson was visited by investigating officers at approximately 3:00 p.m., 4:00 p.m., and 6:00

p.m. that day. The first visit was for "booking" purposes, enabling the officers to ask background questions. At approximately 4:00 p.m., the investigating officer who was present with Jackson reported that he made a spontaneous inquiry about the circumstances regarding his detention. He asked "Why am I under arrest? Are you charging me with killing a cop?"

According to the medical records and testimony by the hospital attendants, Jackson was just beginning to regain consciousness at around 3:00 p.m. At 4:00 p.m., Jackson was transferred to another hospital.

At the 6:00 p.m. interrogation, Jackson was read and waived his Miranda rights. According to the investigating officers, Jackson made several semi- incriminating remarks. Jackson was told that he was being charged with "murder" and, in a "questioning tone of voice," responded "I killed a policeman?"

Jackson was visited by a detective the next day at noon. During that interrogation session, Jackson again waived his Miranda rights. When the detective asked if Jackson remembered him, Jackson said he was one of "the cops who say I killed that officer with a shotgun." The detective said that he had never mentioned anything about a shotgun. According to the detective, Jackson fumbled for a response and replied that he must have seen it in the newspaper. The detective testified that at that time Jackson was strapped to the bed and his eyes were swollen.

At trial, Jackson's attorney essentially conceded all the factual observations made by the witnesses at the scene of the incident, but attempted to establish that Jackson was too drugged to have formed the requisite mental intent. Indeed, the only defenses presented at trial or on appeal related to the sufficiency of evidence and instructions related to his mental state and mental capacity at the time of killing Wrede.

The prosecution wisely predicted this defense and, as its primary evidence of cognition, introduced evidence of

Jackson's comments to the officers who interrogated him at the hospital hours after the incident. Jackson's trial attorney objected to this evidence as "irrelevant" and "hearsay." The prosecution argued that, as statements of a party opponent, the statements were not hearsay. The trial court overruled the objections and admitted all the statements made by Jackson to the investigating officers. Defense counsel never questioned Jackson's competency to waive his Miranda rights and never objected to the evidence as having been elicited without a valid Miranda waiver.

Among the claims heard at the evidentiary hearing, Jackson asserts that trial counsel rendered ineffective assistance in failing to suppress these comments under Miranda. In addition a host of other variations as to how trial counsel's performance was constitutionally deficient were presented. Jackson was represented by William Klump, ("Klump"), who was a Deputy Public Defender Grade IV at the Pomona branch office of the Los Angeles County Public Defender's Office. Klump obtained the services of Robert Bund, ("Bund"), an experienced investigator who was in charge of the investigators in the Public Defender's Pomona branch office, to assist him in the investigation for Jackson's case. Bund generally handled the more serious cases in the Pomona branch office.

Also heard at the evidentiary hearing was Jackson's claim that there is "new" evidence confirming his legal innocence, primarily medical evidence, including the results of a PET Scan, which Jackson suggests shows he was "incapable" of forming the legally required mental intent.

Jackson's claim of ineffective assistance of trial counsel, including the three sub-claims for which an evidentiary hearing was neither requested nor necessary, will be considered first, followed with an examination of Jackson's claim of innocence of first degree murder with special circumstances.

III. General Principles Applicable to Claims of Ineffective Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to assistance of counsel. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685 (1984). Rather, the Sixth Amendment guarantees legal assistance in order "to ensure that the trial is fair." Id., 466 U.S. at 686. As such, "the Court has recognized that 'the right to counsel is the right to effective assistance of counsel.'" Id. (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970)).

The oft-repeated Strickland test for assessing the effectiveness of counsel requires petitioner to satisfy two prongs --deficient performance and resulting prejudice. As further elaborated by the Ninth Circuit:

> To make out a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's actions were deficient and that the deficiency prejudiced the defendant. To demonstrate deficiency, the defendant must show that counsel's actions were "outside the wide range of professionally competent assistance." To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir.1992) (citations omitted, brackets original), (quoting Strickland, 466 U.S. at 687-90, 694).

"When considering a claim of ineffective assistance of counsel, [the court must] focus on the assistance actually received by the defendant. The purpose of the right to effective assistance of counsel is not to pass judgment on

the actions of defense attorneys, but to ensure that criminal defendants receive the zealous, competent defense to which they are entitled." Chacon v. Wood, 36 F.3d 1459, 1464 (9th Cir.1994) (emphasis removed).

In light of these objectives, a defendant does not make out a viable claim of ineffective assistance of counsel simply by harping on counsel's choice of trial tactics. As emphasized by the Supreme Court, "strategic decisions made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. To succeed on a claim of ineffective assistance of counsel, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound tactical strategy.'" Strickland, 466 U.S. at 689.

On the other hand,

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary.

Strickland, 466 U.S. at 690-91.

Nonetheless, counsel's investigatory objectives are not subject to judicial review *de novo*. There is a " 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and '[j]udicial scrutiny of counsel's performance must be highly deferential.' " Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994) (quoting Strickland, 466 U.S. at 689). This deference extends to decisions regarding the scope of an investigation: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy

measure of deference to counsel's judgment." Strickland, 466 U.S. at 691.

However, deference does not mean abdication. "[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Sanders, 21 F.3d at 1456 (emphasis original). "A lawyer has a duty to investigate what information ... potential [ ]witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id., 21 F.3d at 1457 (quotations and citations omitted). Notwithstanding the deference afforded to counsel, an attorney's performance will be found deficient where the attorney "neither conducted a reasonable investigation nor demonstrated a strategic decision for failing to do so." Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir.1995), cert. denied, 116 S.Ct. 1335 (1996).

In analyzing an ineffective assistance of counsel claim, the Court's "overriding concern is to determine whether counsel's conduct so undermined the functioning of the adversary process that the trial cannot be relied upon as having produced a just result." McKenna v. McDaniel, 65 F.3d 1483, 1492 (9th Cir.1995), cert. denied, 116 S.Ct. 1451, 134 L.Ed.2d 570 (1996). [3]

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3. The fact that Jackson's case was trial counsel's first capital case with a penalty phase is of only little import. EHT, vol. 9, at 6- 7. The Strickland standard is not concerned with determining whether trial counsel "possessed" the background, training and experience to handle a particular criminal case, United States v. Cronic, 466 U.S. 648, 665- 66, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), but rather whether counsel's actions or omissions "reflected a failure to exercise the skill, judgment, and diligence of a reasonably competent criminal defense attorney." United States v. Tucker, 716 F.2d 576, 586 (9th Cir.1983). Undeniably, "[t]he character of a particular lawyer's experience may shed light in an evaluation of his

IV. Claim 3(A): Failure to Adequately Investigate Mental Defense[4/]

In Claim 3(A) Jackson complains that Klump failed to conduct a reasonable investigation into Jackson's mental state at the time of the shooting. Jackson acknowledges that Klump conducted at least a preliminary investigation into a mental health defense. Jackson alleges, however, that Klump never interviewed the medical personnel who treated him at the hospital and who observed him over the course of many hours. Jackson also asserts that Klump failed to obtain his medical records from the hospital where Jackson was treated soon after being arrested. Jackson also asserts that, although Klump knew that he had been a long-time PCP user and intended to present a mental- health based

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actual performance," Cronic, 466 U.S. at 665, but the lawyer's level of experience is never dispositive. Id.

4. While now it appears that Jackson is including allegations regarding Klump's efforts in obtaining the opinions of Dr. Blake Skrdla and Dr. John Mead within this claim, to do so expands the claim inappropriately. While Klump's actions with respect to Dr. John Mead are the subject of a separate claim 3(K), and will be considered there, the Court will not examine in any detail the allegations relating to Dr. Skrdla as they are not properly before the Court.

Moreover, even if these expanded allegations were properly before the Court, they would not entitle Jackson to federal habeas relief. Jackson complains that Klump possessed the "exact" opinions that he had focused upon in his investigation, yet the jury did not hear any of these opinions. However, Jackson's characterization of the opinions of Dr. Mead and Dr. Skrdla as strong support for his PCP defense is mistaken.

defense, Klump made no efforts to have Jackson tested for any psychological or neurological deficits.

Jackson asserts that Klump knew that he was under the influence of other intoxicants, including cocaine, at the time of the crime but that he did not attempt to investigate the effect of the combination of various intoxicants. In addition, while the parties stipulated that the Sheriff's Department detected tested 160 ng/ml of PCP in Jackson's blood and the National Psychopharmacology Laboratory detected a PCP blood level of 176 ng/ml, Jackson alleges that Klump made no effort to explain to the jury the significance of a PCP blood level of 176 ng/ml.

A. Failure to Obtain Petitioner's Medical Records or to Introduce These Records into Evidence

Klump testified that he obtained and reviewed Jackson's medical records from Queen of the Valley Hospital, ("QVH"), where he was briefly hospitalized following the shooting, before being transferred to the Los Angeles County/University of Southern California Medical Center jail ward ("LAC/USC"). EHT, vol. 9, at 25; EH Exhibit 8. The purpose of Klump's review of these records was to determine the nature of Jackson's condition at the time he was admitted to QVH. EHT, vol. 9, at 25. His review revealed that: (1) Jackson's blood and urine samples tested positive for PCP; (2) Jackson had been nonverbal for approximately one and one-half hours; (3) Jackson had been treated for shock; and (4) Jackson had demonstrated signs of being under the influence of PCP. EHT, vol. 9, at 26. Klump instructed Bund to interview the medical personnel at QVH. EHT, vol. 9, at 26.

At trial Klump presented the testimony of two nurses, Gerald Osacho and Letitia Whittington, and one doctor, Dr. Rosebrough, all of whom had treated Jackson in the emergency room at QVH. Klump's purpose in calling these witnesses was to show that Jackson was under the

influence of PCP when he was admitted to QVH and to demonstrate the extent of his PCP intoxication. EHT, vol. 9, at 26.

While Klump did not actually introduce the medical records into evidence, he elicited the pertinent information from the QVH medical personnel on the stand. As discussed infra with respect to claim 3(C), most of the information regarding Jackson's physical condition when he was admitted to QVH and during his stay was brought out.

The only specific information that Jackson complains was not actually before the jury was evidence that Jackson was placed on dialysis. However the medical records indicate that Jackson was placed on dialysis on September 7, 1983, seven days after the shooting. EH Exhibit 44, at 72-73. Jackson has not adequately demonstrated that Jackson being placed on dialysis plays any kind of a significant role in ascertaining Jackson's level of consciousness at the time of the crime or at the time he was questioned by the police.

Dr. Aniline, hired by Klump, testified that while dialysis can diminish the level of a patient's consciousness, and that it could "add to an impairment," he also acknowledged that dialysis could also affect a person's mental state in the opposite way. EHT, vol. 9, at 41-42. Thus there is no conclusive evidence that dialysis necessarily affected Jackson in a negative manner, such that it was important evidence that should have been before the jury. Dr. Aniline had no specific opinion as to the effect of dialysis on Jackson's mental processes.

Therefore Klump's decision to set forth the evidence of Jackson's medical condition before the jury solely through the testimony of the medical personnel, and not by actually admitting the medical records into evidence, does not amount to deficient performance within the structure of Strickland, supra.[5]

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5. To the extent that Jackson alleges that admitting

B. Failure to Interview the Medical Personnel Who Treated Jackson on the Day of the Incident

Jackson complains that Klump did not interview Dr. Rosebrough, Gerald Osacho, and Letitia Whittington, the three individuals who treated Jackson at QVH. However other than the evidence of dialysis which was discussed supra, Jackson has not pointed to any other specific evidence that should have been presented. Therefore Jackson has failed to show that he was prejudiced based on this allegation of ineffective assistance of counsel.

C. Failure to Obtain Appropriate Medical Testing Before Trial

Jackson alleges that Klump unreasonably failed to obtain an expert to perform commonly used psychological and neuropsychological tests on Jackson to develop evidence that he was physiologically and psychologically incapacitated by PCP such that he was incapable of forming the requisite mental states for first degree murder. Klump did request an electroencephalogram ("EEG"), to be performed on Jackson. The results of both the alcohol-induced EEG and the normal EEG revealed nothing out of the ordinary. EHT, vol. 9, at 33; EH Exhibit 14. Dr. Aniline did testify that one possible way of measuring the effect of PCP on a particular person was through an EEG, although it was quite unclear as to whether an EEG is diagnostic or not. RT at 1163-64.

Ironically, Jackson now relies upon the very same expert Klump retained for Jackson's trial. Dr. Aniline testified as to what types of physiological- neurological

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the medical records would have assisted Gerald Osacho, one of the attending nurses at QVH who treated Jackson, in his testimony, this aspect of the claim is analyzed in conjunction with claim 3(J).

tests should have been completed to ascertain mental impairment. Dr. Aniline now opines that the following tests should have been administered: "(a) MMPI (multiphasic test) and associated tests of mental function; (b) computerized neuropsychological tests, i.e., psychological tests which permit specific tests of concrete and abstract mental tasks; and (c) the 'EEG and Evoked Potentials,' which measures involuntary brain wave responses to light and sound." Aniline Narr. at ¶ 68. Dr. Aniline believes that had these tests been done, along with repeated blood and urinalysis tests, Jackson's cognitive abilities on the day of the shooting could have been objectively determined. Aniline Narr. at ¶ 69. Dr. Aniline did not advise Klump of the necessity of these tests before trial, although he was retained to advise on Jackson's mental state.

Dr. Aniline also points out that even if none of the above-identified tests had been performed at the time of the incident or soon thereafter, an adipose tissue removal procedure, combined with a battery of psychiatric tests, could have established "several months later ... the validity of Petitioner's amnestic condition at the time of the incident." [6] Aniline Narr. at ¶ 70.

The irony is that Klump sent Dr. Aniline a letter in which he informed Dr. Aniline of the tests that had been conducted up until that point in time, and stated that he would appreciate Dr. Aniline's "observations regarding this case as soon as possible." EH Exhibit 17. Despite being asked for advice, Dr. Aniline did not ever make any suggestions to Klump about information that should be obtained or was needed to assist in Jackson's PCP defense. Aniline Dep. at 22; EHT, vol. 9, at 58. Dr.

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6. Dr. Aniline's use of the word "amnestic" simply indicates that Jackson had no memory of the events. He does not use this term to indicate any effect on Jackson's state of mind.

Aniline did not recall ever suggesting that an EEG or any other tests should be done. Aniline Dep. at 29-30. When questioned about the same issue, Klump testified that Dr. Aniline never recommended any psychological or neurological tests be done on Jackson. EHT, vol. 9, at 55-56, 58. Nor did either of the other two psychiatrists consulted in the case ever recommend that additional tests be done on Jackson. EHT, vol. 9, at 58.

Klump fulfilled his obligation regarding the mental defenses of Jackson when he consulted with Dr. Aniline, an expert in the area of PCP, who had testified in a dozen criminal cases before. RT at 1155. Klump specifically requested Dr. Aniline's input in Jackson's case. EH Exhibit 17. "[A]n integral part of an expert's specialized skill at analyzing information is an understanding of what information is relevant to reaching a conclusion." Hendricks, 70 F.3d at 1038. In fact "[e]xperts are valuable to an attorney's investigation, then, not only because they have special abilities to process the information gathered by the attorney, but because they also are able to guide the attorney's efforts toward collecting relevant evidence." Id. at 1038-39 (emphasis added). "To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that the attorney already be possessed of the skill and knowledge of the expert." Id. at 1039; accord Bloom v. Vasquez, 840 F.Supp. 1362, 1370 (C.D.Cal.1993). The law does not impose such an impossible duty on trial counsel.

Jackson relies on Evans v. Lewis, 855 F.2d 631, 636-37 (9th Cir.1988), for the proposition that since the medical tests which allegedly could have been conducted will no longer provide any reliable information, prejudice has been demonstrated. This case is distinguishable. In Evans the court found that trial counsel rendered constitutionally inadequate assistance because he conducted no investigation to determine the extent of any

possible mental impairment, despite the fact that he was on notice of a pre-sentence report referring to defendant's two previous incarcerations in mental institutions. Id. at 636-37. Here Klump took the appropriate step in obtaining the opinions of three psychiatrists, one of whom was involved in the research of PCP and its effects, and none of the experts recommended further testing. Therefore Klump's failure to recognize that further testing was available and could have been helpful does not constitute deficient performance. Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir.1990) ("It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts."), cert. denied 503 U.S. 910, 112 S.Ct. 1275, 117 L.Ed.2d 501 (1992).

D. Failure to Investigate Evidence That Jackson Was Under the Influence of Other Intoxicants

When Klump reviewed the medical records from QVH he found that they showed Jackson had signs of amphetamine and cocaine in his system. EHT, vol. 9, at 26. This was brought out through the testimony of Dr. Rosebrough, who treated Jackson in the emergency room at QVH. Dr. Rosebrough testified that Jackson's urine screen testified positive for amphetamines and cocaine, and his blood screen tested positive for PCP, although the exact levels of these drugs found in Jackson were not measured. RT at 954-55. He further testified that these drugs could have contributed to Jackson's level of consciousness, and could result in confusion. RT at 954, 970.

At trial, prior to the defense presenting any witnesses, the parties stipulated that a drug screen was performed on Jackson while he was at QVH, showed PCP and cocaine present in the blood sample, but the amount was not quantified. RT at 907. The parties further stipulated

that the same blood sample was later tested by the Los Angeles County Sheriff's Department, which found 160 ng/ml of PCP in Jackson's blood, and no cocaine. RT at 907. The parties also stipulated that the same blood sample was also tested by the National Psychopharmacology Laboratory, which reported a 176 ng/ml of PCP in Jackson's blood. RT at 907. Immediately thereafter the prosecutor corrected himself, stating that the drug screen conducted at the QVH did not reveal cocaine in any amount. [7] RT at 909. Klump accepted all these stipulations.

Jackson now complains that Klump should have investigated the existence of other intoxicants further. The amount found in Jackson's urine drug screen at QVH was not quantified, and testing of a blood sample by a

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7. This discrepancy regarding the existence of cocaine in the blood sample is explained in the letter Klump wrote to Dr. Aniline in which he explained what tests had been performed on Jackson at the hospital:

> There were two urine samples taken and two blood tests. One urine and blood taken at the hospital when emergency treatment was administered and the others taken at a later date. The first urine showed the presence of PCP and cocaine. The later urine only showed a.1 microgram/milliliter of PCP. It is my understanding that the cocaine dissipated and thus didn't show up when the later urine was taken. There is no evidence of the amount of PCP or cocaine that was found during the first test. The blood test at the hospital was just for emergency use per the homicide officers and thus the blood taken later in the jail ward was analyzed and showed 160 nanograms per militer [sic] of blood to be positive for PCP."

EH Exhibit 17.

chemist employed by the Los Angeles County Sheriff's Department revealed there was no cocaine in the sample. RT at 907. In light of these findings Klump, who was not appointed to represent Jackson until twelve days after the shooting when all cocaine would have dissipated from Jackson's system, was not deficient for focusing on the quantified amount of PCP which was confirmed to be in Jackson's system by several different tests. Nor can the effects of cocaine in Jackson's system, if any, now be evidence of the mental condition of Jackson at the time of the murder.

Dr. Aniline now believes that Jackson was under the influence of cocaethylene, a chemical compound formed by alcohol and cocaine. Yet Dr. Aniline admits that urinalysis is a poor method for diagnosing cocaethylene. EHT, vol. 2, at 56; Aniline Dep. at 148. He states that a blood screen for cocaethylene is a better method. EHT, vol. 2, at 58. He also acknowledges that "cocaethylene could not be detected by standard toxicological screens used by hospitals in 1983. "Aniline Narr. at ¶ 57. Dr. Aniline further conceded that while 100 plus ng/ml of cocaethylene would result in severe impairment, he did not suggest "that there was ever that kind of cocaine or cocaethylene in his [Jackson's] system to play a significant role in his behavior." EHT, vol. 2, at 58. Dr. Aniline's own concession is bolstered by Dr. Baselt's opinion that it is highly unlikely that the ingestion of alcohol and cocaine the night before the shooting would result in the presence of cocaethylene in a person the following day, such that it would produce significant psychological effects. Baselt Narr. at ¶ 18. Dr. Aniline's beliefs are conclusions unsupported by any evidence.

Jackson was not prejudiced by Klump's acceptance of the fact that the amount of cocaine in Jackson's urine screen was unquantified and the later blood screen, which Jackson's own expert at this hearing testified is a more reliable indicator of cocaethylene levels, conducted by the Los Angeles County Sheriff's Department revealed no

cocaine in the blood sample. The effects of cocaine on Jackson is a non-issue.

E. Failure to Present Expert Testimony Explaining the Significance of Jackson's Level of 176 ng/ml of PCP

Jackson complains that Klump never presented the jury with expert testimony regarding the significance of the level of PCP in his system, which was stipulated to be 176 nanograms per milliliter of PCP. RT at 907.

However Klump did focus on the level of PCP in Jackson's blood when he presented his hypothetical to Dr. Aniline. The hypothetical tied together all the bizarre behavior exhibited by Jackson, along with the clearly stated facts that a short time after his arrest, amphetamine and cocaine were detected in his urine, along with a "PCP reading of a hundred and 77 nanograms per milliliter in his blood." RT at 1186. Rather than simply focusing upon the number, Klump cited examples of Jackson's actions like running down the street in his stocking feet, crouching in the bushes, indecisively attempting to cross a street, leaping, diving, and attempting to pull a sapling tree out of the ground. RT at 1184-85.

Prior to testifying, Dr. Aniline did not tell Klump any facts that appeared supportive of Jackson's defense. Moreover, Dr. Aniline never told Klump that Jackson's level of 176 ng./ml was so extraordinarily high that such a PCP level would incapacitate even a chronic user. EHT, vol. 9, at 54. Rather Klump had been told by Dr. Aniline that it was difficult to predict particular behavior in a PCP user by just looking at a blood level. EHT, vol. 9, at 54.

Nevertheless Klump did present evidence to show that "in many ways the effect of PCP is both unpredictable in the individual and unpredictable in terms of the behavior that results." RT at 1142. Dr. Aniline testified that a chronic user of PCP could be "set off" with a slight amount of PCP. RT at 1147. Klump also elicited

testimony to show that a chronic user could tolerate higher levels, and not necessarily be unconscious but would be impaired. RT at 1151. Klump also made an effort to elicit testimony to show that PCP levels could not be analogized to alcohol blood levels as there is no agreed upon intoxication level. RT at 1164-66. Rather Dr. Aniline testified that: "from a clinical point of view, at the present time, we are looking at practically anybody who has a behavioral disturbance associated with a positive blood level as someone who is in a practical sense intoxicated." RT at 1166. Klump further emphasized this point when Dr. Aniline confirmed that "a person can become intoxicated with PCP and the nanogram count can be say 50 or it can be a hundred or it can be 150 or whatever." RT at 1167.

Klump followed this up with questions regarding what kind of behavior would be consistent with PCP intoxication. RT at 1167. Clearly Klump was attempting to alleviate the need to show one magic number to establish that Jackson was actually intoxicated with PCP. This would lighten his burden of proof in this respect. Under the theory, he would then only have to show that Jackson's behavior was consistent with someone intoxicated on PCP. At a bench conference in the middle of his direct examination of Dr. Aniline, Klump in essence explained what he wanted to present. When the prosecutor objected to Dr. Aniline's ongoing narrative as irrelevant, Klump stated:

> Basically, I asked him to give some examples of some behavior that was consistent with people being intoxicated under PCP. And I think that that's what he's doing.
>
> So I feel that in order to give a general idea as to how some people do act under the influence of PCP, which from his testimony there really is no general symptoms that somebody can say this person acts always this way. He's got to use different examples of the people that he has

> actually seen to explain the, shall we say, the unsolidifying examples.
>
> In other words, you can't say that a person under the influence of PCP does this every time. And I think that's why he has to show the examples that different people act different ways. I think that's what he's doing.

RT at 1170-71.

In this way Klump could explain how Jackson was able to take certain actions, and yet still be intoxicated to the point that he would effectively be unconscious. Dr. Aniline was then asked questions regarding whether some type of stress or other provocation could cause a person under the influence of PCP to overreact. RT at 1172-73. Klump's questioning of Dr. Aniline demonstrates his trial strategy for the evidence regarding PCP intoxication. As the prosecutor demonstrated during cross-examination, simply relying on a numerical value for the level of PCP in one's blood was not enough. The prosecutor questioned Dr. Aniline about individuals with PCP levels five to eight times greater than the level Jackson had, and was able to show individuals with those kinds of PCP levels were able to partake in physical actions which had no relationship to reality.

Dr. Aniline testified, notwithstanding the level of 176, other variables might improve or diminish a person's level of consciousness independent of the numeric value of the PCP level in the blood. EHT, vol. 2, at 39. Therefore it is possible that Jackson's blood ph level, which fluctuates on its own, could have fluctuated to a point where Jackson might have a higher level of consciousness than what another individual with a different ph level would have with 176 ng/ml. EHT, vol. 2, at 39. Klump's obvious strategy to show that a blood level is not dispositive on the issue of PCP intoxication was not unreasonable. It cannot be said that Klump's strategy in this area was constitutionally inadequate.

V. Claim 3(B): Failure to Prepare PCP Expert Dr. Aniline to Testify

In claim 3(B) Jackson alleges that although Klump did present the jury with the expert testimony of Dr. Aniline, Klump did not undertake reasonable efforts to prepare Dr. Aniline to testify as an expert on Jackson's behalf. Jackson complains that Dr. Aniline's testimony was ineffectual since it failed to connect the general information about PCP intoxication, which varied widely among various individuals, to how Jackson's PCP intoxication likely affected him on the day of the shooting. Jackson complains that, as noted by the California Supreme Court, Klump did not have Dr. Aniline meet with or examine Jackson. More significantly, he alleges that Dr. Aniline did not even have access to Jackson's medical records, either from the hospital immediately after the arrest or, for that matter, any of his general medical records. Jackson acknowledges that Dr. Aniline testified about "chronic users" or "high levels" of PCP. He complains, however, that Klump never attempted to have Dr. Aniline opine as to whether Jackson would be considered a "chronic user," whether 176 ng/ml was an "extremely high level" even for Jackson, or what the likely effects of the PCP would have been on Jackson himself or on the likelihood that Jackson actually premeditated or deliberated the killing or acted with an intent to kill Wrede.

Jackson also alleges that Dr. Aniline was unaware of Jackson's "chronic multi- drug addiction" and did not testify as to how the abuse of several different drugs might have affected Jackson and his thinking processes. Jackson further contends that Dr. Aniline could have testified that a person high on PCP, such as Jackson, would likely have been "agitated" by the flashing lights on the police car and would likely have attempted to strike at the lights. Jackson notes that this is significant because Wrede was standing on the opposite side of the car next to the light bar, which was flashing, and that most of the shotgun pellets went into the light bar and only one struck Wrede.

A. Factual Background

Two months prior to trial Klump retained Dr. Aniline, a psychiatrist, to "testify to the general behavior of a person under the influence of PCP, what it does to the person, how their thinking patterns are and that nature." EHT, vol. 9, at 46; Klump Dep. at 193, 213. Klump wanted the information with respect to a chronic user and a casual user. EHT, vol. 9, at 50. This met the needs of Klump's overall trial strategy which was to show that Jackson was under the influence of PCP, making him incapable of forming the specific intent to kill, deliberating or premeditating, establishing that Jackson was not guilty of first degree murder. EHT, vol. 9, at 13. Prior to his appointment in Jackson's case, Dr. Aniline "had testified in a number of trials that involved PCP as the agent to which [he] gave expertise." Aniline Dep. at 13.

Dr. Aniline generally testified about the effects and after-effects of PCP intoxication. He testified that a first-time user who had 100 ng/ml of PCP in his bloodstream would be rendered unconscious. RT at 1149-50, 1152. Because PCP remains in the system even after its immediate effects wear off, Dr. Aniline testified that he could not identify a precise level at which a "chronic user" would be intoxicated or rendered unconscious. RT at 1144, 1146, 1152. Indeed, he explained, since PCP remains in the system, a "chronic user" might be "set off" by only a slight amount of PCP. RT at 1147. Dr. Aniline also described some of the reactions that people may have to PCP intoxication.

When presented with the hypothetical, which summarized the actions taken by Jackson on the day of the shooting, Dr. Aniline said in his opinion the hypothetical individual was under the influence, and acting under the influence, of PCP at the time of the crime. RT at 1186. When asked if the hypothetical person would be capable of deliberating before or while he was shooting the police officer, Dr. Aniline said he did not know, that some of his

ability to think would be impaired, and the ability to deliberate is part of that. RT at 1191. When asked if the hypothetical person could premeditate, Dr. Aniline stated that he could not answer specifically, and that although "the information suggests that there was an impaired ability to, say premeditate, to think," he simply could not say whether the hypothetical person did or did not premeditate. RT at 1193. He gave the same answer when asked if the hypothetical person could have the specific intent to kill or have malice aforethought. RT at 1193-94. Klump then asked if Dr. Aniline was saying that he could not give an opinion as to the hypothetical person's mental state, and Dr. Aniline confirmed this. RT at 1194.

Dr. Aniline also testified that PCP, given in clinically effective doses, "always produces the amnesia." RT at 1168. He further testified that

> PCP is one of the unique drugs that is very often associated with partial memory states, meaning that some things are remembered and other things are not, even though an individual may be behaving, let's say in somewhat normal patterns, they can eat, sleep, deal with things socially or go through many known behaviours.

RT at 1168.

Throughout his testimony Dr. Aniline indicated that an individual intoxicated with PCP might only be able to recall part of an event that occurred while they were intoxicated, or might recall all or none of the event. RT at 1180.

On cross-examination Dr. Aniline admitted that he had not examined Jackson nor had he interviewed him. RT at 1197. Nor had he performed a neurological workup on Jackson, or studied his background. RT at 1200. This questions were intended to discredit his testimony. Dr. Aniline also admitted that he had encountered individuals with PCP levels up to 900 nanograms per milliliter, individuals who were grossly intoxicated. RT at 1206. In addition, Klump had previously stressed that Dr. Aniline was not strictly a defense expert, as Dr. Aniline had testified that

his ratio for testifying as an expert for the defense side versus the prosecution side was about 50-50. RT at 1155. However in cross-examination it came out that in criminal cases, as opposed to civil commitments, Dr. Aniline testified primarily for the defense. RT at 1196-97.

B. Failure to Supply Dr. Aniline with Medical Records

Prior to testifying, Dr. Aniline was asked to review various materials, including the toxicological reports, the murder book, and transcripts from Jackson's trial. [8] RT at 1198. Dr. Aniline testified that he had reviewed all the trial transcripts. RT at 1198-99. However on cross-examination Dr. Aniline admitted that he had not reviewed any of Jackson's medical history, nor had he asked to see the medical history. RT at 1199- 1200. Jackson alleges that Dr. Aniline's testimony did not persuade the jury because he was impeached in this manner. However, Jackson has not established that there is a reasonable probability that what Dr. Aniline could have presented, if he had been given the medical records, would have convinced the jury to impose a sentence other than death. See Clabourne v. Lewis, 64 F.3d 1373, 1387 (9th Cir.1995). Dr. Aniline obviously had no problem testifying to the effects of PCP on Jackson through his answers to the hypothetical put to him by Klump.

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8. Dr. Aniline spent a couple of hours reviewing the murder book, another three or four hours reviewing trial transcripts, four to six hours reviewing literature, and another three or four hours consulting with Klump via telephone and on the day of the trial. EHT, vol. 2, at 69; Respondent's Narrative Statement of Witness: Orm Aniline, at 4; Aniline Dep. at 21-22.

Dr. Aniline was aware of most of the information contained in the medical records because that information was presented through the testimony of two paramedics, two nurses and the emergency room physician, and Dr. Aniline was given the trial transcripts to review in order to prepare for his own testimony. Thus he knew that Jackson was in a nonresponsive state in the emergency room at QVH. Unlike Clabourne, here the majority of the information contained in the medical files had been brought out during the trial. See Clabourne, 64 F.3d at 1385.

The only evidence that Jackson identifies was not available to Dr. Aniline was the fact that Jackson suffered from renal (kidney) failure and had to be placed on dialysis. Nevertheless, Dr. Aniline admits that while renal failure caused by rhabdomyolysis is a condition found in PCP intoxicants, it is also caused by physical trauma. Aniline Narr. at ¶ 52, 64. Dr. Aniline recognizes that both PCP intoxication and physical trauma were present in Jackson's case. Aniline Narr. at ¶ 64. The evidence showed that dialysis was started on September 7, 1983, a week after the shooting. EH Exhibit 44 at 72-73. While Dr. Aniline relied upon the fact that Jackson underwent dialysis in forming his present opinion, he testified that he took into consideration that dialysis can affect mental impairment in opposite ways, both positively and negatively. EHT, vol. 2, at 41-42. The fact that Jackson underwent dialysis was not necessarily caused by the PCP intoxication, nor was it evidence that Jackson's mental state was negatively impacted.

In addition, while the fact that dialysis was prescribed for Jackson demonstrates the seriousness of Jackson's physical condition, such evidence would simply be cumulative when viewed in light of all the other evidence presented by the five other individuals who administered medical care to Jackson on the day of the shooting. It is not clear that testimony regarding dialysis, if presented during Jackson's trial, would have substantially strengthened Dr. Aniline's testimony, since Dr. Aniline's testimony at the evidentiary hearing was equivocal at best.

C. Failure to Arrange for Dr. Aniline to Interview Jackson

Jackson has misconstrued Klump's testimony and concluded that Klump effectively instructed Dr. Aniline not to interview or otherwise meet with Jackson. However, as this Court previously recognized, Klump sent Dr. Aniline a letter over five weeks prior to trial in which he stated that he would "appreciate" Dr. Aniline's views on the subject of whether it would be "advantageous" for Dr. Aniline to interview Jackson. EH Exhibit 17. Klump further stated that he would appreciate Dr. Aniline's "observations regarding this case as soon as possible." EH Exhibit 17. While Klump expressed his own doubts that such an interview would be helpful due to Jackson's claimed lack of memory, he did ask specifically for Dr. Aniline's opinion on the matter. EH Exhibit 17. Dr. Aniline does not recall ever suggesting to Klump that it would be necessary to interview Jackson. Aniline Dep. at 16, 20; EHT, vol. 2, at 67. Nor did Dr. Aniline recommend that it would be necessary for other medical personnel to interview Jackson for Dr. Aniline to render his opinion. EHT, vol. 2, at 67. While now Klump recalls that he "instructed" Dr. Aniline not to interview Jackson, (EHT, vol. 9, at 48-49), he also admitted that if Dr. Aniline had requested to interview Jackson, "they would have talked about it." Klump Dep. at 193-94. The letter does not itself appear to be a true instruction, but merely an observation that as Jackson's attorney, Klump did not see the value in an interview but he left the issue open to suggestion from the professional, Dr. Aniline. EH Exhibit 17. More importantly, Dr. Aniline himself did not feel that he was denied the opportunity to interview Jackson. Aniline Dep. at 20-21. Dr. Aniline testified that he does not recall ever being discouraged by Klump from interviewing Jackson. Aniline Dep. at 20.

Therefore while Klump testified that he would have discouraged an interview, Dr. Aniline never advised him that such an interview would be necessary or even helpful.

EHT, vol. 9, at 49-50. In light of the fact that Dr. Aniline never suggested that Klump should reconsider his own position regarding the necessity of an interview, Klump's performance was not deficient.

Jackson has not demonstrated that if Dr. Aniline had requested and obtained an interview of Jackson that he could have testified to a 90 percent degree of certainty in 1984 that Jackson could not have the requisite mental state necessary for a first degree murder conviction. R's Br. at 37. Rather Dr. Aniline stated that if psychological-neurological tests had been done, in conjunction with repeated blood tests and urinalysis tests, Jackson's mental state could have been rigorously evaluated. Aniline Narr. at ¶ 68-69. Dr. Aniline did not recommend that these tests be done at the time he was consulted, apparently since it was some four months after the incident, nor did he recommend any other tests such as the adipose tissue removal procedure, which in conjunction with a battery of psychiatric tests, could have been conducted even several months after the incident to show the validity of Jackson's amnestic condition at the time of the shooting. Aniline Narr. at ¶ 70. Moreover, Dr. Aniline actually clarified his testimony in the evidentiary hearing, stating that in 1984 he was not ninety percent certain that Jackson could not harbor the mental state for first degree murder. EHT, vol. 2, at 16.

D. Failure to Prepare Dr. Aniline to Testify

At trial, when presented with a hypothetical in which Jackson's behavior immediately preceding and during the shooting was described, Dr. Aniline testified that he could not give an opinion as to the hypothetical person's mental state. RT at 1194. Klump then pointed out that although an unbiased expert, whose opinion was based upon a reading of all the witnesses' testimony and his general expertise, testified that because of "the nature of the drug" he could not say whether Jackson deliberated or

premeditated or could harbor malice aforethought, it was a factual determination that the jury would have to make. RT at 1465-66, 1472. Klump felt that if an expert could not say one way or another, it would be a basis to establish doubt as to whether a first degree murder was committed. RT at 1465-66. Klump stressed the nature of the drug and the fact that its effects were so unsure. RT at 1466.

Dr. Aniline was prepared and did render an opinion based upon a hypothetical, as to whether the individual described had the ability to think, premeditate and cognate, and felt he could render such an opinion "based on the descriptions and particularly the blood levels obtained." Aniline Dep. at 13. He also believed that he could furnish an opinion as to whether Jackson's conduct, described in the Murder Book, were consistent with the type of behaviors found in individuals intoxicated with PCP. Aniline Dep. at 13.

Jackson cites Clabourne as controlling authority on this issue. However, in Clabourne the expert, who had only two days to prepare for his testimony, was "wholly unprepared." Clabourne, 64 F.3d at 1384. Here, while Dr. Aniline's testimony did not operate to save Jackson from a guilty verdict, its lack of success cannot be substantially attributed to a lack of preparation on Klump's part. Lack of success does not equate incompetent assistance of counsel.

Jackson places undue emphasis on the confusion regarding what Klump believed Dr. Aniline, as an expert, could testify to, contending that he did not prepare Dr. Aniline to testify as to whether the PCP intoxication likely precluded Jackson from forming the intent to kill Wrede or from premeditating and deliberating that act. [9] Klump

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9. The defense of "diminished capacity"--that the defendant did not have the capacity to premeditate or deliberate--was abolished in California in 1982. Nonetheless, criminal defendants were left with a defense of "diminished actuality"--that the defendant did not in fact

believed that he could not ask the expert his opinion on an ultimate fact, such as whether the expert believed that Jackson deliberated or premeditated. Klump Dep. at 200-01. Ultimately Klump was permitted to and did ask such questions, pursuant to the trial court's ruling. RT at 1189-1191, 1993-94. Klump testified that he believes the trial court's ruling were actually incorrect on this issue. Klump Dep. at 201-02. When faced with an objection to Klump's questioning of Dr. Aniline, the trial court itself indicated that there was some confusion surrounding the issue: "Well, to be quite frank about it, Mr. Ouderkirk [the prosecutor], I don't know what the state of the law is. I don't think the legislature really understands what the state of the law was when they changed the law." RT at 1192.

Nevertheless, Klump asked the questions and then utilized Dr. Aniline's inability to give a definitive answer to support his argument that if even an unbiased expert who worked for the county could not say that Jackson premeditated or deliberated, there was no grounds for the jurors to find otherwise. RT at 1463-66. As a result, any

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premeditate or deliberate, even though they might have had the capacity to do so. People v. Saille, 54 Cal.3d 1103, 1111-12, 2 Cal.Rptr.2d 364, 820 P.2d 588 (1991).

The trial court's and Klump's confusion regarding what an expert like Dr. Aniline could testify to arose in part from the changes made to Section 29 of the California Penal Code, which provided that any expert testifying in the guilt phase of a criminal action "shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." CAL PENAL CODE § 29; see also Saille, 54 Cal.3d at 1111-12, 2 Cal.Rptr.2d 364, 820 P.2d 588.

misunderstanding on the part of the trial court or Klump as to the permitted scope of Dr. Aniline's testimony, rather than prejudice Jackson, was effectively utilized by Klump to further support Jackson's defense.

Furthermore, this Court was in a position to examine what Dr. Aniline could have presented, with a conservative estimate of over four hundred and fifty hours of preparation over a four year period. EHT, vol. 3, at 10-11. This included a complete and thorough review of all of Jackson's medical records, hindsight with respect to what did not work at trial, a 1995 PET scan, and evidence of new scientific developments including evidence of PCP specific receptors. Despite the extended preparation and pains taken by Jackson and Dr. Aniline to present evidence at the evidentiary hearing to show that Jackson could not form the requisite mental state for first degree murder, Dr. Aniline was still effectively impeached when confronted with instances of Jackson's behavior which he agreed involved comprehending "a number of directions in sequence, mechanical agility, [and] intellectual processing." EHT, vol. 2, at 19. Dr. Aniline conceded that "nonverbal behavior is probably a slightly lower form [of thinking] than that preceded by a verbal description or response or threat." EHT, vol. 1, at 220. In addition Dr. Aniline admitted that based upon the testimony of the witnesses, Jackson demonstrated the ability to adjust his conduct depending on Wrede's conduct, which would require something more than a reflective-type motoric response. EHT, vol. 2, at 20. Therefore, the Court is unpersuaded that there is a reasonable probability that more thorough preparation of Dr. Aniline back in 1984 would have resulted in a different verdict.

VI. Claim 3(C): Failure to Move to Suppress Evidence Obtained in Clear Violation of Jackson's 5th Amendment Rights, and Failure to Adduce Available Evidence to Explain That Evidence

A. Factual Background

Hospital records indicated that Jackson was in a "shock like" state when he was admitted to QVH. Dr. Rosebrough, the emergency room physician testified that, when Jackson was admitted, he was "in a lesser state of consciousness." RT at 954. Other medical personnel testified that Jackson was "sweaty," (RT at 981, 985, 1000), had extremely low blood pressure (90 over 40), (RT at 982), and "appeared to be under the influence of an unknown substance." (RT at 1000). Prior to being brought to QVH Jackson had been "thrashing around" so much that the paramedics were unable to establish an intravenous connection before bringing him to the hospital. RT at 995. Nor would Jackson tolerate the paramedics putting an oxygen mask on him, as he removed it by "combative" behavior. RT at 991, 993.

Gerald Osacho ("Osacho"), one of the attending nurses, testified that when Jackson was admitted to QVH he was in a "shock like state," but not "true shock." RT at 1072. Osacho testified that Jackson showed his first signs of verbal responsiveness at about 3:00 p.m. RT at 1072-73. At that time, Officer Guzman, one of the officers assigned to guard Jackson at QVH asked him some routine booking questions. Exhibit 203. This was the first time Jackson was questioned, and the interview is referred to hereinafter as the "3:00 p.m. booking interview." Officer Guzman did not deliver any Miranda warnings. At that point there is a factual dispute as to whether Jackson was responding to a question asked by Officer Guzman, or, whether he simply spontaneously asked, "I shot that policeman?" (12 RT 1060:1-12.) Jackson alleges that his question was a response to Officer Guzman's questions, which were to the effect of "Do you know what you did?" or "Do you know

why you're here?" RT at 1060. However Guzman reported that at no time was any mention made to Jackson about why he was under arrest, nor was Jackson given any information regarding the death of an officer. EH Exhibit 203; Guzman Dep. at 48. Officer Guzman also reported that Jackson answered the booking questions concisely, without hesitation or delay. EH Exhibit 203.

Officer Guzman also reported that at precisely 3:57 p.m., without questioning or prompting, Jackson asked him "Why am I under arrest? Are you charging me with killing that cop?" EH Exhibit 203. This is hereinafter referred to as the "3:57 spontaneous statement." That this statement was made by Jackson was confirmed by Osacho. RT at 1065. Jackson was then transferred to the LAC/USC jail ward. The hospital records indicate that Jackson was admitted to LAC/USC, which was located approximately 20 miles from QVH, at 4:00 p.m.

At 5:50 p.m., Detectives Lee and Bumcrot, detectives from the Los Angeles County Sheriff's Department's Homicide Bureau, who were assigned to the case, came to interview Jackson. This is the second interview, and it is referred to hereinafter as the "second interview." Evidence of this conversation was introduced during the prosecution's case-in-chief. RT at 875-80. Detective Lee testified that he read Jackson his rights as required by Miranda v.. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that Jackson orally waived those rights, saying that he did not want an attorney "at this time ." RT at 875-76; Lee Depo at 105-106 119; EH Exhibit 204. Detective Lee testified that, during the second interview and before any mention had been made of any police officer, Jackson asked why he was under arrest, that Detective Lee responded "murder" and that Jackson stated, in a questioning voice, "I killed a policeman?" RT at 877; EH Exhibit 200 at 14. Detective Lee testified that he had not mentioned anything about a police officer's death prior to Jackson's statement. RT at 877. At the end of the ten to twelve minute interview, Jackson again asked why he was in custody and

was again told "murder," to which he responded "I didn't kill that cop." RT at 878-79.

Detective Lee testified that he and Detective Bumcrot returned to interview Jackson again the following day at around noon. RT at 879. This is the third time Jackson was interviewed, and it is referred to hereinafter as the "third interview." Detective Lee said that he again read Jackson his Miranda rights and that Jackson again waived them. RT at 879; EH Exhibit 208 at 2. Detective Lee testified that he asked Jackson if he remembered who he and Detective Bumcrot were, and that Jackson responded "Yeah, you are the two policemen that said I killed that cop with a shotgun." RT at 879-80; EH Exhibit 208 at 2.

Detective Lee said that when he informed Jackson that he had never before mentioned anything about a shotgun, Jackson asserted that he must have read it in a newspaper. RT at 880. Detective Lee said that he observed that Jackson's eyes were swollen shut [10] and his hands were strapped to the hospital bed. RT at 880. When he mentioned this to Jackson, and commented that it would be difficult for him to read a newspaper, Jackson stated that "he was unsure" where he had learned about the shotgun. RT at 880.

Jackson testified that he did not recall the detectives reading him his Miranda rights, and that the detectives were the ones who first mentioned the shooting and the shotgun. RT at 1230-32, 1235. Jackson only recalled being interviewed by the detectives on one occasion, and said there was no other conversation because he had been given a card by an attorney, which he in turn had given to the medical personnel. RT at 1234, 1267, 1272.

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10. Jackson himself testified that at the time his eyes "was all puffed up and I couldn't, you know, see that good so I can't say I do or I don't [recognize the officers]." RT at 1230.

Prior to the prosecution putting Detective Lee on the stand, Klump objected to the prosecutor's attempt to introduce evidence of the second and third interviews on the grounds that they were irrelevant, hearsay, and on the basis that the statements were denials, not admissions. RT at 870, 884-85. After a hearing outside the presence of the jury, the objections were overruled. RT at 885.

When Klump cross-examined Detective Lee, Lee admitted that he believed that Jackson had not heard of the killing of a policeman based on the fact that neither he nor Detective Bumcrot mentioned it to Jackson themselves. RT at 895. Moreover Lee conceded that neither he nor Bumcrot were with Jackson when he was transported to the LAC/USC jail ward. RT at 902. Lee further acknowledged that the only people who heard what transpired during the third interview were the two detectives and Jackson. RT at 901-02. Klump further elicited from Lee a description of Jackson's physical condition when he was interviewed by the detectives, using photographs that were taken of Jackson shortly after his arrest. RT at 900-01. Detective Lee also admitted that prior to the third interview the detectives did not ascertain whether Jackson was under any kind of medication. RT at 902. However on redirect Detective Lee testified that Jackson seemed to know where he was, who he was speaking to and he never indicated that "he didn't understand what was going on." RT at 903.

B. Grounds for Claim

Jackson complains that Klump did not object on the grounds that the circumstances of any of the interviews rendered them unfairly coercive as violative of due process, nor did Klump object on the ground that Jackson was not mentally capable of knowingly and intelligently waiving his Miranda rights at any of the interviews. Because no objection was raised, the trial court did not hold a hearing to determine whether Jackson's Miranda waivers were

voluntary, knowing and intelligent. Jackson also complains that Klump failed to produce evidence to show that the statements Jackson made did not support the inference that he was able to recall the shooting of Wrede.

C. Analysis

In order to demonstrate ineffective assistance of counsel, Jackson must demonstrate that Klump performed deficiently and that the deficient performance prejudiced Jackson's defense. The first issue is whether Klump's decision not to move to suppress the statements Jackson made to Detectives Lee and Bumcrot under Miranda or due process grounds was deficient performance. Jackson must demonstrate that there was a reasonable basis for a motion to suppress, and that the failure to interpose an objection on these grounds was not the result of a reasonable professional decision.

Klump reviewed the initial report made by Detectives Lee and Bumcrot prior to trial. EHT, vol. 9, at 59-60; 68-69. Jackson had indicated to Klump that he was advised of his Miranda rights, that he agreed to be interviewed, and that the report was essentially correct. [11] EHT, vol. 9, at

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11. Jackson contends that although Klump states that he had been told by Jackson that the statements he made were made after a Miranda waiver, that Klump still put Jackson on the stand and allowed him to deny that such Miranda warnings were given. However Jackson actually testified that he did not recall that Miranda warnings were given, (RT at 1230), and apparently mixed up the contents of the two interviews into one. RT at 1231-34. Moreover, the testimony Jackson furnished was effectively challenged on cross-examination. Jackson admitted that he remembered the events surrounding the interviews differently that the detectives did. RT at 1266-67. Jackson also admitted on redirect that he was not saying

72, 75, 164. Although Jackson cites a portion of Klump's deposition testimony, to allegedly show that Jackson never told Klump anything about the interviews, the Court finds that what Klump said is that he shared the police account of the interviews with Jackson, and Jackson did not say that anything was wrong with the police version of the interviews. Klump Dep. at 284-85.

Jackson also told Klump that at the time he was interviewed by the detectives, he did not know how he had found out that he had shot a policeman but he thought he must have heard it some place. EHT, vol. 9, at 72. He told Klump that his wife, Sabrina Jackson, had brought a newspaper article to him while he was in the hospital. EHT, vol. 9, at 161. However, neither Jackson nor Ms. Jackson, nor anyone else, could establish the date and time of day on which Ms. Jackson had brought in the newspaper for Jackson's review. EHT at 73, 161- 62. While it was clear that Ms. Jackson could not have visited Jackson before the second interview Jackson had with Detectives Lee and Bumcrot, no one ever told Klump that there was even a possibility that Ms. Jackson might have visited Jackson before the third interview. EHT, vol. 9, at 73-74, 161-162; S. Jackson Dep. at 166-67.

Based on the information he had, and that provided by Jackson, Klump did not believe that there were adequate grounds to support a motion to suppress on grounds that the statements were involuntary or unreliable, or that the statements were fabricated. EHT, vol. 9, at 75-77. While Klump believed that the statement Jackson made in the second interview regarding whether he killed a policeman was potentially harmful, he felt that since the statement was made in the form of question, he could still argue that Jackson did not recall shooting the officer. EHT, vol. 9, at

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that he didn't talk to the police officers on two occasions, but only that he did not recall having done so. RT at 1272.

69. Jackson himself testified that while he was in the jail ward and after being questioned by the officers, he had the presence of mind to listen to an attorney's advice, take the attorney's card and give it to the hospital personnel to prevent another interrogation. RT at 1234. Of course this testimony was given to support Jackson's version that only one interview actually took place. Moreover, even in Jackson's version of the one interrogation that took place, Jackson was capable of asserting that he was not the man who shot the policeman, and that the "other man" was getting away. RT at 1231. This also demonstrates that he was aware that an interrogation was taking place and that he did not want to be viewed as the suspect in the case.

Jackson has not demonstrated that Klump's performance in this area was deficient. Nevertheless the Court will examine whether Jackson could demonstrate prejudice arising from the alleged errors of trial counsel with respect to the statements Jackson made during the police interviews.

1. Whether A Motion To Suppress Would Have Been Successful

a. 3:00 p.m. Booking Interview

When Jackson made the remarks at the 3:00 p.m. booking interview, the hospital records indicated that Jackson was in a sufficiently delusional state of mind so as to render questionable the reliability of any statements he made around that time. Up until 3:00 p.m., he had been described as having been in a "shock like" state and a "lesser state of consciousness." Osacho testified that Jackson was not even demonstrating verbal responsiveness until 3:00 p.m., nearly 3 hours after his arrest.

While Klump would have had an adequate basis for objecting to Jackson's statements made at the 3:00 p.m. booking interview on due process reliability grounds, the statement came in through the confusing and convoluted

testimony of Osacho, a defense witness, on direct examination. Thus there was no basis for a motion to suppress. [12/]

Moreover, while Jackson was clearly in custody and clearly being questioned, as to most of the information, the inquiry was permissible as background questioning. Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990). While there was a factual dispute as to whether Jackson was asked a question that went beyond any background questioning, the fact is that Osacho's testimony was very confusing and it is speculative to assume that the jury was able to ascertain from his testimony that Jackson had in fact volunteered information regarding the shooting of a policeman. Nor was Osacho questioned on this point on cross-examination. Osacho also made it clear that he did not consider it part of his job to monitor the conversation between Jackson and the policemen, so he really did not attempt to remember the details of the conversation. RT at 1061. Therefore there was no basis for a motion to suppress, and it is doubtful that the statement, viewed in light of the manner in which it was presented, was particularly harmful.

b. 3:57 P.M. Spontaneous Statement

The spontaneous statement made by Jackson in which he asked, "Why am I under arrest? Are you charging me with killing a cop?" (RT at 1065), was elicited from Osacho on cross-examination. The fact that it came out was one of the risks Klump took, after weighing the benefits versus the risks, in presenting Osacho's testimony. While Jackson contends that there were other witnesses who testified to

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12. To the extent that Osacho should have been better prepared to testify, or should have been called as a witness at all, this aspect of the claim is discussed in the context of claim 3(J).

Jackson's physical condition, making Osacho's testimony unnecessary, there is no evidence to support that contention. Dr. Rosebrough testified that "most of the nursing care was done by Mr. Osacho." RT at 956. Nurse Whittington testified that her shift ended when Jackson was awake but not talking, and she "signed off to Mr. Osacho." RT at 1082-83. As Osacho himself testified, he stayed with Jackson throughout "his entire stay in emergency," and he, along with Officer Guzman, were the first people that Jackson talked to when he became verbal. RT at 1054. Thus, there was good reason to put Osacho on the stand, and the decision to do so was not unreasonable.

If Klump had attempted to object to Jackson's spontaneous statement that he made at 3:57 p.m. on August 31, 1983, there is little likelihood that the objection would have been successful. All the testimony indicates that Jackson made these remarks spontaneously, without any inquiry or prompting from the officer. A statement is not excludable under Miranda when the suspect himself volunteers the information. Oregon v. Elstad, 470 U.S. 298, 312-14, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985); Miranda, 384 U.S. at 478; United States v. Booth, 669 F.2d 1231, 1237 (9th Cir.1981).

c. Second Interview

Undoubtedly some attorneys would have objected to the second interview of Jackson in the hospital. Although Jackson was read his Miranda rights for the 5:50 p.m. interview, Klump could reasonably have argued that Jackson was either still under the influence of the PCP, or that his mental abilities had not yet resumed to normal after detoxifying. Insofar as Jackson had been classified as "comatose," was still tied down to the bed, recovering from a police beating and PCP intoxication, was in need of kidney dialysis, and was still being characterized as unresponsive as late as 3:00 p.m., Klump would have had a reasonable basis for asserting that any Miranda waiver was not knowing,

voluntary, and intelligent. This would have enabled Klump to keep out one interview that the prosecutor relied upon to show that Jackson had independent memory of the shooting.

On the other hand, Klump was not incorrect that to some extent, the questions Jackson posed to the officers was helpful in that it demonstrated that he did not in fact remember what had occurred. Moreover, Jackson cannot establish that he was prejudiced by the statements made during the second interview because the third interview could not have been excluded on involuntariness grounds, and the third interview had separate evidence demonstrating that Jackson's memory of the events on the day of the shooting was intact.

d. Third Interview

The interview at noon on the day following the shooting presents a difficult scenario in which to argue that Jackson's statements were not voluntary or reliable. There is no convincing evidence that Jackson was still under the influence of PCP on the following day, other than his own convoluted testimony that he does not recall being interviewed twice. [13] There is no evidence that the "totality of the circumstances" showed that the statement was obtained "by physical or psychological coercion or by improper inducement," such that Jackson's will was "overborne." Hayes v. State of Wash., 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). Clearly "coercive

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13. The Court notes that Jackson was recovering from the events of the day before, which included injuries incurred when he was struggling with the arresting officers, as well as dog bites to the groin inflicted by the police dog. While Jackson points out that he ultimately required kidney dialysis, the dialysis was not ordered as medically necessary until September 7, 1983, over a week after Jackson was admitted to the hospital. EH Exhibit 44 at 72-73.

police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); accord United States v. Cazares, 112 F.3d 1391, 1394 (9th Cir.1997). It is only if Jackson demonstrated such coercive activity by the police that Jackson's alleged mental incapacity becomes relevant. Derrick v. Peterson, 924 F.2d 813, 818 (9th Cir.1990), cert. denied 502 U.S. 853, 112 S.Ct. 161, 116 L.Ed.2d 126 (1991). There is no indication that the interview was coercive in any way, or that the interrogating officers took advantage of Jackson's physical condition. Nothing in the evidence suggests that Jackson's statements were involuntary or unreliable, or that Klump should have suspected the alleged involuntariness or unreliability of Jackson's statements. Clearly "[t]he 'reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ' Langford v. Day, 110 F.3d 1380, 1386-87 (9th Cir.1996) (quoting Strickland, 466 U.S. at 691)).

In his own closing statement Klump explained Jackson's statements in two different ways. He first emphasized that there was "a big difference between a denial and asking a question." RT at 1484-85. Klump acknowledged that the prosecution had made an issue with respect to Jackson mentioning a shotgun and that a police officer was killed. RT at 1485. He explained that according to the expert, Dr. Aniline, "PCP has an anesthetic effect where you have partial amnesia and you can have recall of certain things after they happened and still be in effect unconscious when the things are happening." RT at 1485. Klump later argued that Dr. Aniline established that it was possible to be unconscious, and do a series of acts, and then "not recall any of it or remember part of it at a certain time. 'I remember there was a shotgun. I remember there was a police officer." ' RT at 1486-87.

Klump then pointed out what Jackson did remember, which was being surrounded by bright lights and hearing a

statement about a "hero," and that Jackson's recollection was that there was only one interview with the police in which he asked questions about whether he killed an officer, or identified the police officers as the ones "who asked me if I shot the officer with a shotgun." RT at 1489-90. Klump argued that Jackson's inability to recall that there were two interviews like the officer said, was consistent with finding that Jackson was still under the influence of PCP at that particular time. RT at 1490.

Klump's argument was rebutted by the prosecutor, who pointed out that Jackson had to "make the officer's version [of the questioning wrong] ... because it kind of messed up his big amnesia block of time." RT at 1493. He further argued that there was evidence that Jackson had memory because he was the one who knew about the killing and the shotgun being used. RT at 1494. The prosecutor argued that Jackson was not claiming he had amnesia about the interviews, but rather that it simply didn't occur the way Detective Lee said it did. RT at 1493. This does not totally rebut Klump's argument though since Klump argued that it was possible that Jackson could have had partial amnesia.

The manner in which the statements were utilized by the prosecution, and explained by the defense, indicates that even if a motion to suppress should have been made, and was successful, the statements were not dispositive as to any of the issues in dispute in the case. Dr. Aniline had already testified that it was possible for someone intoxicated on PCP to have partial amnesia. Nor was the fact that Jackson could have some memory of the shooting the only evidence that damaged his PCP defense. In light of the overwhelming evidence of Jackson's ability to premeditate, deliberate, and intend to kill, in that during the fight he was looking for weapons to use, he recognized a shotgun in the car, he was able to engage in serial actions to cock the gun, and he aimed or pointed the gun at the officer, there is not a reasonable possibility that the fact that Jackson's memory appeared to be intact resulted in the jury finding Jackson guilty of first degree murder.

2. Whether Jackson Was Prejudiced by Klump's Failure to Present Evidence Showing That Jackson Could Have Learned the Details of the Shooting From An Outside Source

Assuming arguendo that Klump should have investigated the source of Jackson's information with respect to the shooting or the shotgun, anything presented would have only served as circumstantial evidence to show Jackson had information, the very information that he did not recall ever providing to the police until after it was raised by them. RT 1230-32. While Klump never did discover exactly how Jackson would have heard about the shotgun, he believes that he might have decided against bringing it up again in closing argument because he did not want to emphasize the testimony before the jury again. RT at 162-63. Klump also believed that it would be difficult to argue that Jackson had overheard the information from the officers' conversations because Jackson recalled being called a hero, and that is not something he was likely to hear from the police. EHT, vol. 9, at 163-64. Jackson himself claimed he did not know the source of his knowledge.

In determining whether prejudice occurred based on Klump's limited investigative efforts, the Court also looks to what Jackson could have shown with respect to how he learned about the shotgun. Sabrina Jackson, Jackson's wife, testified that she had not gone to visit Jackson on the day of the shooting, August 31, 1983, which was the same day on which Jackson made three different statements about the shooting of a policeman. But Ms. Jackson did go to see Jackson on September 1, 1983 at the LAC/USC jail ward,[14] as well as on the following day, September 2, 1983. S. Jackson Dep. at 166-67. Therefore any information

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14. Ms. Jackson also testified that during the visits Jackson appeared to be oriented as to his location and never mentioned being in pain. S. Jackson Dep. at 183.

Jackson learned from Ms. Jackson would only have affected his third interview by the police, which took place at noon on September 1, 1983. However, Ms. Jackson could not say for certain that she visited Jackson before noon, but believes she did because she wanted to see him as soon as possible. S. Jackson Dep. at 167-68.

Ms. Jackson does not know if it was on the first visit or the second that she told him that he was in the jail ward because he had shot a police officer. S. Jackson Dep. at 176. She testified that she brought a newspaper article for Jackson on the second visit because he said that he did not believe that he had shot the policeman. S. Jackson Dep. at 176, 177, 180. Later in the deposition Ms. Jackson stated that she did not tell Jackson he shot the officer prior to getting the newspaper article for him. S. Jackson Dep. at 178. She also testified that she does not recall ever telling Jackson about a shotgun. S. Jackson Dep. at 181.

Therefore Jackson did not have access to the newspaper article until after his third interview with the police, and he did not obtain the information about the shotgun from his wife. Clearly this evidence would not have assisted Jackson in demonstrating how he came to know the very information that he denied having provided in his interviews with the police.

Jackson has not demonstrated that there was any evidence available that could have established that the information Jackson articulated to the police regarding the shooting was information he obtained from some outside source. Jackson also has not demonstrated that there was anything that Klump could have done that would have revealed the source of Jackson's knowledge. This would be the necessary showing to demonstrate that Jackson was prejudiced by Klump's failure to discover how Jackson knew about the shooting. [15]

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15. It should be noted that Klump in cross-examining Detective Lee, elicited that Lee assumed Petitioner could

Jackson is asking this Court to engage in a two-step speculative analysis. First Jackson asks the Court to find that there was sufficient evidence to establish that he overheard the information about the shooting from some outside source, despite the fact that Jackson himself does *not remember how he obtained the information.* [16] *Second* Jackson asks the Court to assume that if he was in a position to hear the information, he was able to retain the information and that this is the information that came out when he was questioned by police. To show ineffective assistance of counsel Jackson must show prejudice arising from trial counsel's errors in order to be entitled to habeas relief. Hendricks, 70 F.3d at 1036 (to establish prejudice "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); Clabourne, 64 F.3d at 1382 (to show prejudice based on counsel's failure to emphasize that state lost semen samples, petitioner must show "the state intentionally destroyed the semen samples or otherwise acted in bad faith."). Since Jackson has failed to show that how he might have obtained the information regarding the shooting could have been discovered by Klump, Jackson is not entitled to relief on this claim.

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not have received the information from anybody else based only on the fact that neither he nor his partner, Bumcrot, had mentioned the shooting to Jackson themselves. Lee further conceded that neither he nor Bumcrot were with Jackson when he was being transported from the emergency room to the jail ward. RT at 895, 902.

16. Jackson speculates that he might have heard the information at the West Covina Police Department or at the Queen of the Valley Hospital. No evidence supports this speculation.

VII. Claim 3(D): Failure to Prepare Jackson to Testify

A. Factual Background

Jackson testified in his own defense. Jackson testified that he had been arrested and convicted five or six times for being under the influence of PCP. RT at 1238. He testified that he had been a chronic user of PCP for the past six years and, in the summer of 1983, regularly used PCP three or four times a week. RT at 1237-38. Since his entire guilt defense was premised upon the use of PCP, this was an important aspect of his testimony. Jackson also testified to his activities in the morning, including his ingestion of PCP. He did not remember leaving his friends house or the encounter with Wrede, but did recall being "somewhere with a lot of lights in my face and I thought I heard somebody say that I was--I was a hero." RT at 1225-26. He also testified to one conversation with interrogating police officers where they informed him that he had killed an officer with the officer's shotgun. Jackson stated that he told them "you got the wrong man. The other man is out. You [sic] letting the criminal get away." RT at 1231. He further testified that, while in the hospital, he was visited by an attorney who advised him to remain silent and that he gave the attorney's card to a doctor or nurse and never saw the officers again. RT at 1234. Jackson also admitted that he was sent to prison for five months around 1976 for second degree burglary. RT at 1238.

As it turned out, Jackson had six unrelated PCP charges pending at the time he was arrested for killing Wrede. Klump advised Jackson to plead guilty to all of them. RT at 1249. Jackson did so. Jackson now complains that this was bad advice because on cross-examination the prosecution utilized the guilty pleas to create the impression that Jackson pleaded guilty simply as a means to bolster his PCP defense. RT at 1249.

Jackson also complains that Klump did not "weigh and consider the advantages and disadvantages" of calling him as

a witness and, once having decided to call him, failed to prepare Jackson to testify, especially regarding the PCP guilty pleas. Jackson asserts that the lack of preparation resulted in him appearing dishonest and manipulative before the jury. There is no evidence to support these contentions.

On cross-examination, the prosecutor did ask Jackson why he pled guilty to the other PCP charges. Jackson responded that he did so because he was in fact guilty. RT at 1249. The prosecutor noted that Jackson had originally pled "not guilty," and asked if had changed his plea to "guilty" in order to "beat [his] case on a PCP defense." RT at 1249. Jackson denied that he was attempting to look more like a PCP user by pleading guilty, and testified his other public defender who was handling the PCP charges advised him he should plead guilty to enable him to avoid further proceedings in those cases. RT at 1248-49. When pushed by the prosecutor, Jackson eventually said "yes" to the prosecutor's question of whether Jackson pled guilty out of "good citizenship." RT at 1249. When the prosecutor asked Jackson later on in the cross-examination whether he had ever discussed with anyone whether he could "beat this case" if he was really "loaded and out of it" on the day of the shooting, Jackson denied it. RT at 1268. Jackson now contends that his testimony was devastating to his credibility, as PCP intoxication was the only defense asserted in his trial. This contention is without merit since from the facts of the case there is little else Jackson could have relied upon in his defense.

Jackson also complains that trial counsel did not object to the prosecutor's cross-examination of Jackson in which the prosecutor raised the fact that Jackson had been shackled during his transportation to and from the courtroom. There is no evidence that the jury ever witnessed whether or not he was shackled.

B. Whether Klump's Advice to Plead Guilty to the Unrelated PCP Charges Was Constitutionally Defective

Klump testified that he contacted Jackson's attorney, Mr. Gately, who was representing Jackson in his pending PCP charges, and suggested that if the state already had sufficient evidence to convict him on those charges, that it might be in Jackson's best interest to have him plead guilty to those charges. EHT, vol. 9, at 21. Klump explained that this would eliminate any question as to whether Jackson was under the influence of PCP, and Jackson was informed of the recommendation and concurred. EHT, vol. 9, at 21. Thus Klump's advice was based upon strategic decision, one that is well within the range of professionally reasonable judgment. While the strategy may not have been as effective as Jackson would have desired, there was a reasonable basis for handling the unrelated PCP charges in this manner. Klump's advice cannot be said to be constitutionally defective under Strickland.

C. Whether Klump's Decision to Call Jackson to Testify Was Constitutionally Defective

Jackson contends that Klump failed to make a reasoned decision as to whether he should testify on his own behalf. Jackson asserts that the only fact that his testimony could have been used to bring out was his failure to recall the events of the day of the shooting, and that this lack of memory could have been better proven through the testimony of a medical expert. This is sheer speculation, as one could just as easily assert that the best witness to testify as to his ability to recall the events in question was Jackson himself. All other testimony regarding Jackson's ability to remember the events of the day was circumstantial evidence. Klump testified that the decision to testify was a mutual decision, made after discussing the issue. EHT, vol. 9, at 81. Klump opined that he felt the jury would want to hear from

Jackson with respect to his ability to recall the events in question. EHT, vol. 9, at 81.

The Court finds that Jackson possessed the only relevant testimony regarding his mental state at the time of the murder, which went directly to support his mental state defense. Jackson's attempt to now second-guess his attorney's strategic decision is not a basis for federal habeas relief. [17]

D. Preparation of Jackson to Testify

Jackson insinuates that his testimony would have been more effective if he had been better prepared. Jackson contends Klump should have attempted to elicit testimony regarding his addiction to PCP, as opposed to it being a recreational habit, as well as Jackson's history of drug abuse and prior incidents of black- outs and unconsciousness. [18]

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17. Respondent's point that this claim is not properly before the Court as it was not included in Jackson's Amended Petition is well taken. Raising claims for the first time in a Traverse is of no effect. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir.1994), cert. denied, 514 U.S. 1026, 115 S.Ct. 1378, 131 L.Ed.2d 232 (1995). The Court's rejection of this claim on the merits was simply an attempt to adjudicate the issues in a logical manner and reflects no predisposition to permit Jackson to go beyond the scope of the claims properly asserted in the Amended Petition.

18. See the preceding footnote as to why the Court is examining the portion of the claim alleging that Klump should have elicited testimony from Jackson regarding his addiction to PCP, his history of drug abuse, and prior incidents of black-outs and unconsciousness, despite the fact that this portion of the claim was not included in the Amended Petition.

The Court finds that Klump adequately prepared Jackson to testify by advising him to testify as to what he remembered on the day of the murder. EHT, vol. 9, at 82. He explained the prosecutor would probably ask questions about his use of PCP, as well as questions that would suggest that it was convenient that Jackson could only recall certain things and not others. EHT, vol. 9, at 82- 83. He further explained that Jackson should try to stay in control of himself while on the stand, and that it would be better if Jackson avoided getting upset. EHT, vol. 9, at 82. Klump made it clear that in his practice he avoided giving witnesses a "script" for testifying, because it risks making the witness appear rehearsed. EHT, vol. 9, at 82-84.

To the extent that Jackson was effectively cross-examined, this is not directly reflective of Klump's preparation of Jackson to testify. The inference that Jackson pled guilty to bolster his PCP defense which was made on cross-examination is a natural inference, which was wisely used by the prosecution to attack Jackson's credibility. The questions posed were relevant to reveal a possible motive for Jackson to plead guilty to the PCP charges when he did, and Klump simply cannot be held accountable for the fact that the prosecution pointed out the logical inferences to the jury. As discussed above, Klump had a valid strategic reason for allowing the evidence regarding the six unrelated PCP charges to be admitted. Nor was the cross- examination the only instance in which Jackson's veracity was attacked. The testimony of the police officers who interviewed Jackson at the hospital similarly attempted to establish that Jackson did have memory of the shooting, although Jackson testified that to the best of his recollection the interviews did not take place in the manner reported by the officers.

As for establishing that Jackson was addicted to PCP, this was effectively done through Jackson's testimony that he was arrested five or six times for PCP intoxication, as well his use of PCP three or four times a week. RT 1237-38. The fact that Klump failed to ask Jackson about prior

instances of unconsciousness was obviously a strategic decision, as Klump found it harmful that Jackson only reported one such instance of unconsciousness to Dr. Mead, and that instance was not drug-related. Klump testified that this fact would be harmful because it would negate finding that Jackson was unconscious during the shooting of Wrede. EHT, vol. 9, at 38-39; EH Exhibit 15. Moreover, the circumstances surrounding that period of unconsciousness were also harmful as the instance was the result of Jackson's altercation with his drill sergeant in the army, a fact that any reasonable attorney would not have wanted to elicit since it showed yet another instance of Jackson's problems dealing with authoritative figures.

The Court finds that Jackson is not entitled to relief on this claim.

E. Cross-Examination on Jackson's Shackles

Jackson complains that Klump allowed the prosecutor to cross-examine him on the fact that he was in leg shackles throughout the trial. The validity of this claim is refuted by the record.

On the day of the crime, Jackson had been wearing beach shoes which he kicked off before encountering Wrede. The prosecutor asked Jackson about his habit of not wearing shoes. Jackson explained that occasionally he did not wear shoes because he had problems with his back. Jackson testified that he did not dislike wearing shoes. When asked why he was not wearing shoes in court, Jackson explained that he took off his shoes because they were tight when worn over two pairs of socks. Jackson explained that he was wearing two pairs of socks because the "handcuffs been on my leg and it's been tearing up my skin." RT at 1252. Jackson testified that he had been wearing shoes until the leg cuffs were put on. RT at 1252.

The Court finds the first remark regarding leg cuffs was volunteered by Jackson. While the prosecutor should not have asked whether the leg cuffs were on "all the time," since this isolated comment did not devolve into a theme of

the cross-examination, there is no legitimate inference of deficient performance in counsel's failure to object. United States v. Molina, 934 F.2d 1440, 1448 (9th Cir.1991); United States v. Necoechea, 986 F.2d 1273, 1280 (9th Cir.1993). Moreover, Klump did make every attempt to explain the comment through the presentation of the testimony of Deputy Sheriff Donald Daley, who testified the leg cuffs were removed before Jackson entered the courtroom. RT 1273-74. The Court finds the manner in which Klump handled Jackson's cross-examination on this issue was not deficient.

VIII. Claim 3(E): Failure to Adequately Protect Petitioner's Interests in Jury Selection: Venire Challenges and Screening of the Jury During Voir Dire[19]

Jackson contends that Klump's performance was constitutionally deficient due to the manner in which the jury was selected in his case. Jackson is Black, and the victim, Wrede was a White police officer. Klump did not voir dire any of the jurors about their attitudes on race relations, cross- racial bias, prejudice, police officers or the killing of police officers. In addition, Jackson complains that while the primary defense in this case rested upon his intoxication with PCP at the time of the shooting, Klump did not voir dire the jurors on their attitudes regarding the use of illegal drugs. Jackson believes that Klump should have asked the jurors whether they had such strong feelings about illegal drug use that they could not exonerate Jackson of first degree murder, even if they believed that he did not form

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19. Although Jackson actually raises the allegation that Klump played a minor and very passive role during voir dire and the death qualification process under claim 3(F), (Am. Pet. at 42), the Court will examine that sub-claim here as it pertains to the manner in which voir dire in general was conducted.

the intent to kill and/or did not premeditate and deliberate, due to the fact that he had voluntarily ingested enormous amounts of PCP. Jackson also complains that Klump did not voir dire the jurors regarding their views on the death penalty. Finally, Jackson contends that Klump was ineffective in failing to move to strike the jury venire and failing to object, under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978), to the peremptory dismissal of one of the two available African-American prospective jurors.

A. Failure to Screen Jurors Regarding Race Relations, Illegal Drugs, and Victims Status as a Police Officer[20/]

Jackson failed to make any showing that Klump's representation was constitutionally ineffective for failing to inquire himself into the prospective jurors' racial biases, attitudes toward illegal drugs, and attitudes toward police officers and the killing of police officers. Klump admitted that the general practice in state courts varied as to whether the voir dire was to be conducted by the trial judge or the attorneys. EHT, vol. 9, at 182. As Klump explained, he personally believed the court should conduct the voir dire, and that potential jurors, if asked specific questions, would answer in a manner so as not to get excused if they wanted to sit on the jury. EHT, vol. 9, at 182. During voir dire of the four alternate jurors, Klump articulated his own view of the purpose of voir dire: "What we are trying to do ... is we

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20. Jackson's allegation regarding Klump's decision to allow an engineer with the Los Angeles Fire Department and a former matron at the Pomona City Jail to remain on the jury was not raised in the amended petition. Raising the claim in the Traverse is not an adequate substitute. Cacoperdo, 37 F.3d at 507. Therefore these sub-claims are not properly before the Court.

are trying to find twelve or now sixteen people that both sides are comfortable with. And sometimes it's just a--strictly a gut feeling. I mean there is nothing magic about who we allow to sit and who we excuse." RT at 416.

As explained by the Ninth Circuit in the context of cross-racial voir dire:

> Although under current law, the court must afford a defendant the opportunity to question jurors, or request the court to propound questions, specifically about racial bias under certain circumstances, whether the defense will avail itself of such an opportunity will in most instances involve the exercise of a judgment which should be left to competent defense counsel.

Gustave v. United States, 627 F.2d 901, 906 (9th Cir.1980) (citing inter alia, Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), and Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973)).

Here race did not play a role in the case other than the superficial fact that Jackson was Black and Wrede was White. There is no suggestion that the crime was racially motivated nor did either side intend to introduce any racially sensitive matter that would require forewarning the jurors that they would be subjected to hostile comments or information that might make most people uncomfortable.[21]

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21. The prosecutor explicitly stated in his closing argument during the penalty phase:

> One thing that came up in the trial is race. That didn't come up in the trial, it came up by way of the defendant's family.
>
> That is not an issue in the case, never has been an issue. Ken Wrede wasn't killed because of his race. This defendant wasn't prosecuted because of his race.
>
> You know the facts. And I think that was a ploy to maybe influence one person to worry

It was well within the realm of professionally reasonable judgment to decline to inject race into a case where it was not otherwise an issue. As in Gustave, in this case, "the decision whether to request certain voir dire questions was a strategic decision of the attorney and his failure to do so ... is not ineffective representation." Gustave, 627 F.2d at 906.

The same can be said about Klump's failure to voir dire on Jackson's use of drugs and, to a lesser extent, Wrede's status as a peace officer. Wrede's status as a police officer was critical to the case. Jackson would not have been eligible for death unless the jury found that Wrede was killed while "engaged in the course of the performance of his duties" and that Jackson knew or reasonably should have known that Wrede was so engaged. Nonetheless, Wrede's status as an officer was not crucial in the sense that Jackson was motivated by a bias against police officers.

Here the jurors were informed by the Court that the victim was a police officer and asked whether that fact would affect their ability to be a fair and impartial juror. RT 13-17. One juror indicated she could not be impartial due to her family background, and was excused. RT at 16. Later on during voir dire, one of the two African Americans in the jury venire also stated that he was unsure as to whether he could be impartial because several of his relatives were in law enforcement, and Klump stipulated that he be excused. RT at 412. Moreover, throughout voir dire the fact that the victim was a police officer was indicated by the Court countless times. RT at 52. In

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about it and say, "Oh, my goodness. Am I being a racist if I come back with a proper verdict or a verdict of death in this case?"

The answer is no. It's not part of the case. RT at 1611.

Klump responded by acknowledging that race was not at issue. RT at 1624.

addition on several occasions Klump did ask his own questions regarding bias toward law enforcement. RT at 207, 214-15, 338-339.

Because the killing of a police officer is such a tremendous offense, Klump might have been well advised to conduct his own voir dire, in addition to that conducted by the trial court, on this point. However the Court finds that different attorneys might reasonably approach the issue differently. Jackson was not deprived of a fair advocate during jury selection simply because the jury was not voir dired on their attitudes about the killing of a police officer by both Klump and the trial court.

B. Failure to Actively Participate in Death Qualification Process

Klump did make a motion to preclude the prosecution from conducting any attorney voir dire on the jurors' attitudes about the death penalty beyond the questions asked by the trial court under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). As part of the motion, the defense counsel would also have been barred from inquiring into the jurors' attitudes regarding capital punishment. CT at 59-66, 70-78; EH Exhibit 32. The Court understands this was a common defense tactic during the 1960's when popular sentiment was split over the propriety of capital punishment. [22] Klump testified that he

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22. Prior to Witherspoon, a prospective juror could be excused for cause if they expressed any uneasiness at all about the death penalty. In 1968, the Supreme Court held in Witherspoon that capital jurors could be excused for cause only if they made "unmistakably clear" that, under no set of circumstances, could they vote for the death penalty. In 1980, the Supreme Court relaxed this standard in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), holding that prospective jurors

made the motion because he believed that it would allow the defense to obtain a "better cross-section of people," which would include some jurors who did not believe in the death penalty. EHT, vol. 9, at 100-102.

In any event, Klump's motion was denied. CT at 79. Both the prosecution and defense were permitted to inquire into the jurors' views on capital punishment. The death qualification process was conducted primarily by the trial court with the prosecutor asking additional questions. However, Klump regularly asked pertinent questions during the death qualification process. RT at 33-35, 43-44, 51-53, 60-61, 69-71, 89-93, 107-111, 138-139, 155, 162-166, 179-180, 188, 196-198, 207-209, 214-215, 282-283. On several occasions Klump inquired specifically as to the prospective jurors' attitude toward the death penalty. RT at 43, 51, 155, 196-97. It is also clear that Klump made adequate attempts to rehabilitate prospective jurors whose answers to the trial court's questions revealed there were either opposed to the death penalty or unsure as to whether they could bring back a verdict of death. RT at 60-61, 69-71, 89-93, 108-111, 163-166, 179-180, 282-283. Therefore the Court rejects Jackson's characterization of Klump's performance during voir dire as "minor" and "very passive." Am. Pet. at 42. Jackson has failed to show that Klump's performance during the death qualification portion of voir dire resulted in a "breakdown in the adversary process." Strickland, 466 U.S. at 687.

C. Complaints about the Jury Panel

Jackson contends that Klump was ineffective in failing to move to strike the jury venire and failing to object, under

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could be excused if it appeared that their personal views on capital punishment might "prevent or substantially impair" the performance of their duties during the penalty phase.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978), to the peremptory dismissal of the only available African-American prospective juror.

1. Failure to Object to Jury Venire

Jackson has failed to carry the burden of proof with respect to this claim. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir.1982). Jackson has not rebutted this presumption through his unsubstantiated claim that Klump should have challenged the jury venire called for his case because it included only two African-American prospective jurors. Jackson summarily concludes that this was disproportionately low in comparison to the local population.

No evidence was presented during the evidentiary hearing regarding Klump's reasons or lack thereof, for challenging the jury venire. [23] In order to establish a prima facie violation of the fair cross-section requirement, such

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23. In a narrative statement, Klump states that he "considered making a motion to quash the venire on grounds of under representation of African Americans, but he did not believe such a motion would be successful." Klump, Narrative Statement, at 86. However, the narrative statements were submitted pursuant to this Court's order of November 21, 1995. At the hearing the Court made it clear that the declarations would not be admitted for the truth of the matters asserted therein, but rather as a basis for the opinions of the expert witnesses. Accordingly the Court does not rely on Klump's statement provided in his narrative statement. It is also noted that Batson had not yet been decided by the Supreme Court at the time of Jackson's trial.

that a challenge to the venire would have succeeded, Jackson was required to show the following:

> (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the jury; and (3) that the under representation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

Jackson has failed to do this. The Court accepts that only prong two and three of the Duren test would be at issue here. Jackson has failed to introduce what the composition of the venire should have been, based upon the demographics of the community at the time of Jackson's trial. Jackson has also failed to show how the venire selection method used in the community worked to systematically exclude African Americans from serving on jury venires. Duren, 439 U.S. at 364. Nor has Jackson shown that motions to strike venires were commonly granted by Los Angeles Superior Court trial judges based on unconstitutional exclusion of African-American prospective jurors. Jackson's failure to even make a prima facie showing of a violation of the fair-cross section requirement means he has not demonstrated that an objection to the venire would have been successful. Jackson has not shown that he was prejudiced in any way by Klump's failure to challenge the composition of the jury venire. See United States v. Aguon, 851 F.2d 1158, 1172 (9th Cir.1988) (en banc), overruled on other grounds, Evans v. United States, 504 U.S. 255, 259, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992).

2. Failure to Object to Peremptory Dismissal of the Only Available African- American Prospective Juror Under Batson/Wheeler

Jackson complains that Klump failed to object under the well-established Wheeler decision to the peremptory dismissal of the only potential African- American juror, resulting in Jackson being tried by an all White jury. As noted, the venire contained only two African-American jurors. A review of the record shows that the first African-American juror, Mr. Cummings, was stricken from the jury by the prosecutor's use of a peremptory challenge. RT at 384. When Mr. Cummings was excused through a peremptory challenge by the prosecutor, there was one potential African-American juror left. Later that day Klump stipulated that the remaining African-American juror, Mr. Ash, could be excused for cause, based on Mr. Ash's own statement that he had relatives in law enforcement, which would affect his ability to be impartial in the case. RT 412. There is no dispute regarding Klump's stipulation to the excusal of Mr. Ash. It is obvious from the record that Klump stipulated to excusing Mr. Ash because he stated that he would experience difficulty with the case because his brothers and cousin were policemen. RT at 205-09; RT at 412.

Mr. Cummings was apparently removed by the prosecutor because although he testified that he could possibly impose a death penalty in some murder cases, he specifically identified rape murder and multiple murder as examples of such cases. RT at 281, 284. The prosecutor then sought to inquire whether Mr. Cummings could impose the death penalty in a case involving the murder of a police officer acting in the line of duty at the time he was killed, but which did not involve any evidence of rape or multiple murder. RT at 284-85.

Klump objected to that question, and the objection was sustained by the trial court. RT at 285. The trial court noted that the prosecutor was essentially "pre-trying the

case." RT at 286. In compliance with the court's ruling the prosecutor asked Mr. Cummings whether he could impose the death penalty in this case where the special circumstances was a peace officer killed in the line of duty. RT at 289. Mr. Cummings said it was a "possibility." RT at 289. However, his previous answers indicated that he was predisposed to view death as an appropriate penalty only in certain types of cases, and he did not initially include the special circumstances alleged in Jackson's case as one of those cases. The prosecutor later exercised his peremptory challenges to excuse Mr. Cummings. RT at 384.

Klump did not object to the prosecutor's use of a peremptory challenge to excuse Mr. Cummings. EHT, vol. 9, at 180. Respondent alleges that in the event the prosecution did not remove Mr. Cummings with a peremptory challenge, Klump was planning on using a defense peremptory challenge to remove him. Resp't Br. at 90-91. While there is no support identified for this proposition, the Court notes that during voir dire it came out that Mr. Cummings, worked as a Deputy Probation Officer, and worked in a juvenile detention facility. RT at 283, 363.

What is clear is that Mr. Cummings initially put some conditions on the types of cases in which he could foresee voting for the death penalty, rather than simply leaving it as being the appropriate penalty in certain cases, depending on the facts and circumstances. Thus his answers during voir dire stood out and distinguished him from many of the other jurors. In light of Mr. Cummings' answers during the death qualification portion of voir dire there appears to a sufficient non-racial reason for the peremptory challenge. Accordingly, the fact that Klump did not object to the juror's excusal under Batson/Wheeler does not render his performance constitutionally deficient.

IX. Claim 3(F): Failure to Present Jackson's Defense Properly[24]

Jackson complains that Klump did not act as his advocate at trial. Jackson alleges that throughout the trial, Klump conveyed to the jury that he felt Jackson was culpable. Jackson claims that Klump failed to convey a comprehensible defense theory to the jury, despite the overwhelming available evidence which supported one. He specifically complains that Klump's opening and closing statements during the guilt phase constituted constitutionally defective performance. Jackson also criticizes Klump's performance in the penalty phase on the basis that Klump did not make an opening statement, and allegedly made a poor closing statement.

A. Klump's Opening Statement During Guilt Phase

Jackson contends that it was deficient performance for Klump to defer his opening statement until after the prosecution rested because this discredited Jackson as a witness and made an effective defense impossible. There is no question that Klump made the decision to defer his opening statement. RT at 454. As an initial matter the Court finds that there is nothing curious about this decision, and there is little doubt that similar decisions are made all the time by reasonably competent defense attorneys.

Klump testified that as a matter of strategy he believed it was helpful to defer making the opening statement because it enabled him to comment unfavorably on the prosecution's case before presenting any of the defense evidence. EHT, vol. 9, at 94. In addition, Klump believed

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24. The sub-claim in which Jackson complains that Klump played a minor and very passive role during voir dire and the death qualification process is analyzed under claim 3(E), which contains Klump's other alleged errors with respect to the manner in voir dire was conducted.

that by observing the prosecution's case first it allowed the defense to ascertain exactly what they would have to prove, and then include only exactly what the defense would prove in the defense's opening statement. EHT, vol. 9, at 94. There is no doubt that such a decision is well within the standards employed by the criminal defense community at the time of Jackson's trial. The Court finds that every attorney would approach this question differently, and Klump's decision does not amount to ineffective assistance of counsel.

Jackson also contends that when Klump finally made his opening statement he stated that while the prosecution had adequately presented what took place, that the defense would fill in some gaps left open by the prosecution. Jackson believes this granted validity to the prosecution's case. Moreover Jackson complains that Klump never even described Jackson's PCP use, upon which the defense was predicated, nor did he point out contradictions in the police reports and witness statements.

Klump did state in his very brief opening statement, which he characterized as a "brief road map" (RT at 916), that he believed the prosecution had done an "adequate job" in presenting what had occurred. RT at 915. He then pointed out that he believed there were a "few gaps" as to what had taken place, which could be filled in by witnesses that the prosecution failed to call. RT at 915-16. Klump indicated that there were other witnesses that would be presented to testify regarding events that occurred after the incident, which were important to relate back "to what Mr. Jackson knew was going on." RT at 916.

The Court finds that there was no clear tactical benefit to disputing the prosecution's case. The facts were clear with little if any dispute. Jackson's identity was not seriously open to debate. The Court agrees with Klump that it was "quite evident" that PCP intoxication was the defense theory as the descriptions, provided in the prosecution's case, of Jackson's actions prior to and immediately after the encounter with Wrede, were supportive of his PCP defense.

See EHT, vol. 9, at 170. While it might have been preferable for Klump to identify the PCP defense in opening statement, in light of the evidence already presented by the prosecution, it was not absolutely required. Nor was it imperative for Klump to focus on the perceived inconsistencies of the prosecution's case as he himself twice characterized his opening statement as only a "road map." RT at 915-16. Accordingly, Jackson has failed to show that Klump was not functioning as counsel with respect to his opening statement given at the guilt phase.

B. Klump's Closing Argument During Guilt Phase

First, Jackson complains that Klump suggested that it would be hard to decide whether Jackson's alleged premeditation would raise the level of the offense and stated that he did not know if a person's intoxication would lead to a finding of voluntary or involuntary manslaughter. Jackson believes that instead Klump should have assembled the facts and stressed to the jury that the evidence could not lead to a finding of first degree murder. Moreover, Jackson complains that Klump provided the jury with a confusing definition of premeditation and deliberation and the relevance of the PCP intoxication defense.

However, an attorney is not deficient simply because he is not a perfect orator. Klump followed the prosecution's definitions of the different degrees of homicide, using second degree as a starting point. RT at 1459. He then identified the types of factors which would raise or lower the degree of homicide. RT at 1459-62. Klump's theory of the defense was presented clearly in his closing argument. He argued that Jackson was not capable of rational thought due to PCP intoxication and that he was guilty of only manslaughter or, at worst, second-degree murder. Klump identified the primary issue as what effect the PCP intoxication had on Jackson, (RT at 1462), and he linked that issue to the expert testimony of Dr. Aniline regarding the effects of PCP (RT at 1465, 1473, 1486-87). Klump

then articulated the conclusion that would result from consideration of the evidence: that Jackson was incapable of premeditating and deliberating and from harboring malice aforethought due to his intoxication with PCP. RT at 1465-66, 1471, 1491-92.

Klump further pointed out that Dr. Aniline, an expert in his field, testified that because of the nature of PCP and its unpredictable effects on people, one could not say one way or another that Jackson could premeditate, deliberate or have malice aforethought. RT at 1465-66. In addition, Klump attempted to give the jury another option, pointing out that if the evidence showed there is some kind of provocation, the jury should find Jackson guilty of voluntary manslaughter. RT at 1459, 1475. Klump argued that Jackson could have been provoked by Wrede's actions, citing Dr. Aniline's testimony that Jackson's PCP intoxication had caused him to overreact to the provocation. RT at 1475. Jackson complains that this may have confused or detracted from the defense that, whether the response was reasonable or not, his PCP intoxication might have sparked a rage that was not preceded by "deliberation." Jackson's contention that this argument distracted the jury is mere speculation. The Court finds that the choice to argue this was clearly within Klump's discretion. Had counsel not made this argument, it is entirely likely that he would now be under attack for having failed to do so.

Klump testified that he did not tell the jury that the case would be easy because he simply wanted to recognize the difficulty of the jury's job. EHT, vol. 9, at 95. He explained that when he looked at the equities of the case: a good police officer and a family man who gave people he came into contact with a "second chance," versus Jackson, an established PCP user, there was going to be an element of sympathy for the victim. RT at 95-96. Therefore he simply wanted to be professional and matter-of-fact with the jury. RT at 96.

Nor does conceding the objective description of events, as Klump did in his closing argument, fall below the

Strickland standard in this case. RT at 1491. The Court bases its finding on the fact that although Klump stated that the prosecutor had done an "admirable job" presenting the evidence, Klump distinctly pointed out that it is the prosecution's burden to demonstrate, beyond a reasonable doubt, that Jackson had the requisite mental state to warrant a conviction for first degree murder. RT at 1491. Klump explicitly stated that "the People have not proven their case beyond a reasonable doubt to raise it to a first degree." RT at 1491. While the prosecutor had previously argued that Jackson was acting "rational," Klump pointed out his various acts which demonstrated that he was not acting like a "rational" person at all, specifically when he was diving in the street and pulling trees out of the ground. RT at 1486. Throughout his closing argument Klump did his job as defense counsel, which is to " 'subject the prosecution's case to meaningful adversarial testing." ' United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir.1991) (quoting Cronic, 466 U.S. at 659).

Second, Jackson faults Klump for not arguing the "obvious" evidence that showed a lack of consciousness of guilt, i.e., the fact that Jackson did not attempt to flee the scene of the crime, try to get rid of the weapon, or check to see if Wrede was really dead. However, while Klump did not cite this specific evidence, he pointed out other instances of Jackson's behavior which showed the same lack of consciousness. For instance Klump cited Jackson's observed behavior of staggering down the sidewalk, leaning on a telephone pole, squatting in the bushes, not being affected by three or four hits with a police baton, RT 1475-76, 1478. Thus it was not reasonably necessary for Klump to point out to the jury that they could infer from the evidence that Jackson was not aware that he shot Wrede because he did not attempt to escape. Moreover, as Klump recognized, due to the fact that the responding police units arrived so quickly after the shooting, and Jackson was in essence surrounded, he did not have an opportunity to escape anyway. EHT, vol. 9, at 98-99.

Third, although percipient witnesses contradicted each other as to crucial details of the incident, from which one could infer that no one actually saw Jackson aim the gun and fire at Wrede, Jackson complains that Klump characterized the discrepancies as minor, and stated that the prosecutor had done an admirable job in presenting the evidence. What Klump actually did was point out that there were "as many versions as to what did take place as you've got witnesses ." RT at 1478; see also RT at 1468. Throughout his closing argument Klump pointed out the specific areas where there were discrepancies. RT at 1468-71, 1479-84. Klump informed the jury that they would have to determine whether the discrepancies were important or not, but that two things were not controverted: (1) Jackson shot Wrede; and (2) Jackson was intoxicated. RT at 1471.

Klump also attempted to explain that the discrepancies could be attributed to the witnesses "looking at things that are important to them," and further elaborated, saying that depending on the background of the witness, they would tend to focus on certain aspects of what they observed. RT at 1482-83. The one issue that Klump most definitely did not chalk off as a "minor inconsistency" was the testimony regarding whether, when Jackson was in the hospital, he asked a question regarding whether he had killed a cop, or whether he denied killing a cop. RT at 1484-85. Nor did Klump characterize whether Jackson remembered being interviewed once, or twice, by the police in the hospital, as a mere inconsistency. RT at 1490.

Klump testified that he used the term "minor inconsistencies" because he did not want the jury to disregard the testimony of some witnesses completely. EHT, vol. 9, at 97. Since Klump was using some of the percipient witness testimony to establish favorable facts for the defense, in particular with respect to Jackson's behavior, he wanted to downplay some of the inconsistencies. EHT, vol. 9, at 98. Therefore Jackson's characterization of Klump's closing argument is incorrect. The closing statement does not demonstrate that Klump provided ineffective assistance of

counsel. Daniel Webster or Clarence Darrow he was not, but the Strickland measure of performance is not Mr. Webster or Mr. Darrow.

C. Klump's Failure to Make an Opening Statement During Penalty Phase

Klump did not make an opening statement in the penalty phase. [25] RT at 1522. Jackson has not even attempted to explain why the failure to deliver an opening statement during the penalty phase should be considered strong indicia of deficient performance. Jackson has utterly failed to rebut the presumption that Klump's decision to waive the opening statement was not "within the wide range of reasonable professional assistance." Strickland, 466 U .S. at 689. Jackson's bare allegation is insufficient to demonstrate that he is entitled to relief on this claim.

D. Klump's Closing Argument During Penalty Phase

Jackson complains about the way Klump responded to the prosecutor's accusation in his own closing argument that Jackson had sat through the trial with a smirk on his face which demonstrated his lack of remorse over the death of the officer. Klump explained that while he had not been watching Jackson and did not know whether he had been smirking, it was hard for Jackson to "express" sympathy because he had no memory of the incident. RT at 1625. Klump then stressed that Jackson accepted responsibility for the murder, although he had no memory of the incident. RT at 1625. Later on in his closing argument, Klump states that Jackson has been very quiet, has "conducted himself

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25. The Court notes that the prosecutor's opening statement was very brief, simply laying out the three pieces of evidence in aggravation that he was planning to present. RT at 1521-22.

like a gentleman," and has not been "smart or anything like that that I've seen." RT at 1638.

While these statements could not completely neutralize the prosecutor's accusations, Jackson failed to point out what other evidence existed which could have been used to effectively rebut the prosecutor's comments. Nor is there any basis to believe that if Jackson had verbally expressed his sympathy for the officer while on the stand, that the verdict in the penalty phase would have been any different. Jackson has failed to explain how Klump's efforts in closing argument rendered the trial materially unreliable.

X. Claim 3(G): Failure to Inquire Whether Potential Jurors Had Been Influenced by Inflammatory Pre-trial Publicity or the Presence of Police Officers at Trial

Jackson contends that Klump did not protect his rights to a fair trial when he failed to inquire whether potential jurors had been influenced by extensive and prejudicial pretrial publicity, and whether a heavy police presence during trial would influence them. Klump acknowledged that he did not ask any questions about pretrial publicity, and conceded that one news account was incorrect as to whether Wrede ever pulled his gun out during the shooting. EHT, vol. 9, at 181. As explained supra, Klump believed that the trial court should conduct the voir dire, although he acknowledged that the general practice in state courts varied as to whether the voir dire was to be conducted by the trial judge or the attorneys. EHT, vol. 9, at 182.

There is no reliable evidence that the failure to screen the jury venire for their exposure to pretrial publicity affected their determination of a verdict in Jackson's case. The fact that the incorrect televised report which reported that Wrede had never pulled out his gun (EH Exhibit 419 at 7), was run at least six months before voir dire began, cuts against finding that it would have affected the jury verdict in

Jackson's case. [26] Jackson "has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice." Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Accordingly, he cannot show that Klump's performance during voir dire resulted in prejudice.

Jackson has not presented any evidence that the police presence at trial was in fact heavy, or even discernible. Klump testified that while he was not specifically looking at the spectators, he did not recall seeing uniformed police officers in the audience during Jackson's trial. EHT, vol. 9, at 99. Jackson has not attempted to contradict Klump's recollection regarding the presence of police officers during the trial, nor has Jackson shown that other individuals did in fact notice a police presence in the audience during the trial. Moreover, there is no evidence that the police officers, whose presence Jackson complains about, were even in uniform. Even if Jackson had shown that armed security personnel were present, this would not automatically result in finding undue prejudice. King v. Rowland, 977 F.2d 1354, 1358 (9th Cir.1992). The Court notes that Ms. Jackson, Jackson's estranged wife, testified that she does not believe there were a lot of policemen in the courtroom when she was present at Jackson's trial, and if policemen were in attendance, they were not in uniform. S. Jackson Dep. at 190. Therefore Klump's actions do not constitute ineffective assistance of counsel.

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26. There is no evidence that any of the publicity which provided an incorrect account of the shooting, was disseminated less than six months prior to Jackson's trial. Jackson made no showing of how much or what publicity there was.

XI. Claim 3(I): Failure to Move to Exclude Photographic and Videotape Evidence That Lacked Foundation

A. Re-enactment Photographs and Slides

Jackson objects to the use of the re-enactment slide presentation which the prosecution used to assist its witness, Robert Dunham, in his testimony. Dunham drove by the location of the shooting on his way to get some gasoline, and saw Jackson and Wrede arguing. RT at 479, 506-507. After obtaining gasoline, Dunham returned to the same location and saw Jackson and Wrede fighting and then saw Jackson shoot Wrede. RT at 482-95. Dunham testified as to what he observed, and the slides were used to assist him in his testimony. The slide presentation, which was neither offered nor admitted into evidence, was not in any way prejudicial.

Jackson complains that Klump should have objected to the slide presentation as lacking in foundation. He contends that the slide presentation made assumptions about the incident that favored the State's version of events wherever the eyewitness testimony was ambiguous or contradictory. However, the photographs and the reenactment slides did not purport to reflect more than what Dunham had reported. When Dunham was asked whether the slides were a fair picture of what he had observed, he testified that several of the slides were a fair picture, and corrected those aspects of the slides which were not accurate. RT at 500-504. Dunham testified that he observed Jackson lay the gun down on the roof of the police car with his arms down, but with his hand still on the gun. He said that he could see Jackson's eyes and Jackson was watching the police officer. He then saw Jackson pick up the gun, point it right at the officer, and shoot the officer. RT at 493- 95. It is unclear how the slides could have made assumptions favorable to the prosecution about the incident when they were subjected to examination and criticism by Dunham. Such a slide presentation was not a

prohibited use of demonstrative evidence to explain the testimony of a witness. Jackson is not entitled to relief on this claim. [27]

B. Videotape

Jackson also contends that Klump should have moved to exclude a videotape, that was offered as People's Exhibit 39, on the grounds that it lacked foundation. The videotape showed the crime scene shortly after the shooting, and was introduced through the testimony of Detective Lee. RT at 868-69. Klump did object to the introduction of the videotape on the grounds that it was cumulative of other demonstrative evidence. RT at 869. The prosecutor responded by saying that the videotape would show the relationship between Wrede's patrol car and the curb more clearly. The trial court overruled Klump's objection. RT at 873-74. The record shows that Lee testified that the videotape accurately depicted the items he had discussed regarding the crime scene. RT at 894-95. A foundation for the videotape was properly laid.

Jackson complains that the videotape assumed that Jackson aimed directly at Wrede and not at the light bar on top of the patrol car. This videotape account does agree with several eyewitness accounts, including that of Robert Dunham, Lois Payne, and Edward Butler. RT at 495, 544-45, 574, 595-96. It is difficult to see how Jackson could

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27. The Court believes there is at least one explanation for Klump's acceptance of the slide presentation. When discussing why he did not identify Jackson's defense in his opening statement to the jury, Klump noted that the slides "showed Mr. Jackson with his hair all disarrayed and acting, in effect, like a wild man," which he assumed would enable the jury to seek that his client was "not in his right mind when these things took place." EHT, vol. 9, at 170.

assert that the videotape incorrectly depicted that Jackson aimed directly at Wrede, when at least several witnesses testified that Jackson had indeed taken such an action.

Jackson complains that Klump's failure to object to the videotape was prejudicial because the jurors took it into the jury room during deliberations. The videotape was properly admitted evidence and thus under California Penal Code § 1137, the trial court did not err in permitting the jurors to have access to it during deliberations. CAL. PENAL CODE § 1137; see also United States v. DeCoito, 764 F.2d 690, 694 (9th Cir.1985) (finding that "jurors are generally entitled to examine documents properly admitted in evidence"). Moreover, since the trial court rejected the objection that the evidence in the form of the videotape was cumulative, Jackson cannot complain that the evidence should be viewed as prejudicial simply because the evidence was "repeatedly shown to the jurors." Traverse, at 51.

XII. Claim 3(J): Failure to Interview or to Prepare Witnesses Resulting in Unprepared Defense Witnesses and Unchallenged Government Witnesses[28/]

Jackson alleges that Klump failed to conduct pre-trial interviews of any of the prosecution or defense witnesses. "The cases repeatedly stress the importance of interviewing witnesses to the preparation of a defense." Tucker, 716 F.2d at 583 n. 16. The Ninth Circuit has found that "ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case, which includes an independent interviewing of the witnesses." Id. As the circuit affirmed

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28. To the extent that Jackson includes within this claim the allegation that Klump failed to rebut Detective Lee's testimony about Jackson's post-arrest statements, the Court has chosen to analyze that claim under claim C(3).

long ago, a "claim that his attorney failed to interview prosecution witnesses ..., if true, ... could establish constitutionally ineffective assistance of counsel and prejudice to his defense." Baumann v. United States, 692 F.2d 565, 580 (9th Cir.1982) (citing Hines v. Enomoto, 658 F.2d 667, 676 (9th Cir.1981)). The circuit has more recently noted that the "Supreme Court has observed that the trial process generally does not function properly 'unless defense counsel has done some investigation into the prosecution's case and into various defense strategies.' " Siripongs v. Calderon, 35 F.3d 1308, 1314 (9th Cir.1994) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)), cert. denied, 513 U.S. 1183 (1995). "Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics." Sanders, 21 F.3d at 1457; accord Hines, 658 F.2d at 676.

An evidentiary hearing was held here because the Court understands that "these are clearly not the sorts of allegations which the district court could dismiss solely by reference to the petition and the record." Baumann, 692 F.2d at 581; accord United States v. Burrows, 872 F.2d 915, 918 (9th Cir.1989). This is true because such a claim of ineffective assistance of counsel "relates to events which, by definition, occurred outside the trial courtroom." Baumann, 692 F.2d at 581; accord Burrows, 872 F.2d at 918.

After holding such a hearing the Court finds that there is no showing that any failure on the part of Klump resulted in any prejudice. While it appears that the percipient witnesses discussed below were not interviewed by Klump prior to giving their testimony at Jackson's trial, there is simply no indication that if Klump's pre-trial investigation efforts had been more diligent, that the likely results would have been more favorable, or that the result of Jackson's trial would be more reliable. See Strickland, 466 U.S. at 687. Klump properly relied on an experienced investigator to conduct the necessary interviews of witnesses.

A. Adrian Mitchell

Adrian Mitchell ("Mitchell"), a twelve year old boy who witnessed the shooting, as well as Jackson's behavior immediately preceding the encounter with Wrede, was called as the defense's first witness. Klump believed that Mitchell's testimony regarding his observations of Jackson's behavior right before the shooting would be helpful in supporting the PCP defense. EHT, vol. 9, at 123; Klump Depo at 410-411. Klump had reviewed Mitchell's statement made to the police which was contained in the "Murder Book." EH Exhibit 57 at 37, 46. Bund, Jackson's investigator, had attempted to interview Mitchell. Bund Dep. at 30-36. In his reports Bund indicated that Mitchell's mother, Dolores Lawrence, told him that Mitchell was extremely nervous and sick since observing the shooting, and therefore she preferred that he not be interviewed. EH Exhibit 7 at 1. Klump was aware of Mitchell's distress, and testified that Mitchell was handled "a little more sensitive because of his age and because of the trauma that he had undergone in observing what had taken place." EHT, vol. 9, at 80-81. While Klump was not sure if Bund had interviewed Mitchell himself, Bund had informed him that Mitchell would still be available to testify. RT at 127.

On direct examination Mitchell testified that he saw Jackson "yelling," although he was not yelling actual words, "diving," and "jumping." RT at 919- 21. Mitchell characterized the dives as similar to diving head first into second base. RT at 921. This was the extent of the testimony elicited on direct examination.

It is the testimony Mitchell gave on cross-examination that Jackson complains prejudiced him. Mitchell testified that he saw Wrede tell Jackson to put the gun down and that Jackson complied with the order. RT at 938-39. He further testified that he saw Jackson pick up the gun as Wrede was pointing the gun at him, and then Wrede put his own gun down on the trunk of the car and held up his hands, and that was when Jackson shot the officer. RT at

940-41. This testimony was not reflected in the earlier written report of Mitchell's statement to the police. EH Exhibit 57 at 46. This testimony was utilized by the prosecution to show that Jackson was thinking rationally, and that Jackson had the ability to pretend to surrender and then shoot Wrede when the opportunity arise. RT at 1440-41.

Klump, who had objected to cross-examination regarding the actual shooting as going beyond the scope of direct examination, questioned Mitchell about this testimony. He was able to show that Mitchell had not actually heard Wrede tell him to put the gun down, but rather that Mitchell had "assumed" that Wrede had given that order because he saw Jackson put the gun down. RT at 947. Klump then asked if Mitchell had told the police officer who interviewed him about Jackson putting the gun down, and Mitchell stated that he had. RT at 946.

The Court finds that Klump had good reason to call Mitchell to testify, as his testimony reinforced one of the key aspects of Jackson's defense, that his behavior immediately prior to the shooting was truly bizarre. He did impeach Mitchell with respect to the harmful testimony that indicated that Jackson was capable of complying with verbal requests. RT at 947. The portion of Mitchell's testimony that remained unimpeached was Mitchell's recollection that Jackson had put the gun down and then picked it up and shot Wrede, who looked like he was surrendering. However Klump pointed out in closing argument that there were as many versions of the shooting as there were witnesses, (RT at 1478), and that another witness had directly contradicted the testimony that Jackson had put the gun down on the top of the hood of the car. RT at 1469.

Klump did not attempt to directly impeach the twelve-year old boy, but he did adequately point out the inconsistencies in his story, and pointed to other testimony which directly contradicted it. The Court notes that attempting to impeach such a young witness is risky. The fact that now, twelve years after the trial, Klump could not

remember why he did not call the police officer who originally interviewed Mitchell, for the purpose of impeaching Mitchell with his prior statement to the police which did not contain the observation that Jackson put the gun down at one point, is of no moment. This alleged failure on the part of Klump was not raised in Jackson's amended petition and is not part of this proceeding. In light of all the inconsistencies arising from the various witnesses who observed the shooting, Klump's attempt to show that overall the jury could not rely on the details of any one witnesses' story was not unreasonable.

B. Beverly Shelton

Beverly Shelton ("Shelton") was another witness to the shooting. She was in her car, about twenty or thirty feet away from Jackson and Wrede when the fight initially broke out. RT at 1015. She was interviewed by the police after the shooting and her statement was in the Murder Book. EH Exhibit 57, at 42-43. Shelton was called because Klump believed her testimony would support Jackson's PCP defense as it would show some behavior on the part of Wrede that could have triggered Jackson's response. EHT, vol. 9, 79-80. Shelton testified that she saw Jackson ignore several requests made by Wrede for his name and identification. RT at 1016-18. After the fight broke out she saw Jackson pull a stake out of the ground, which he threw at Wrede. RT at 1020. He then attempted to pull up a tree out of the ground, and succeeded at pulling out a second stake. RT at 1020-21.

The testimony Jackson claims was harmful was Shelton's observations that at some point after being asked several times for his name by Wrede, Jackson responded by telling the officer to go away and leave him alone. RT at 1029. She further testified that during the violent portion of the exchange between Wrede and Jackson she heard Jackson use profanity. RT at 1033. Jackson's verbal responses to Wrede were not contained in the statement she

gave to the police. EH Exhibit 57, at 42-43. This testimony was not particularly prejudicial to Jackson as several other witnesses testified that Jackson both responded verbally to Wrede's requests, and used profanity during the encounter.

C. Sandra Downs

Sandra Downs ("Downs"), who was in the car with Shelton, also testified for the defense. Klump presented her testimony to support Jackson's PCP defense, (EHT, vol. 9, at 79-80), as Downs had observed Jackson attempt to pull a tree out of the ground. EH Exhibit 57, at 57-58. Downs testified to her observations regarding Jackson's attempts to pull up the tree. RT at 1042. Downs also testified that when Jackson was asked for his name and identification he responded by saying it was none of the officer's fucking business. RT at 1043. This statement was not contained in the Murder Book's account of her observations. EH Exhibit 57, at 57-58. Jackson complains that this aspect of her testimony was harmful. However, as was the case with Shelton's testimony, this testimony was not particularly harmful as other witnesses reported that Jackson was capable of responding verbally to statements and/or events occurring around him.

D. James Butler

James Butler ("Butler"), one of Jackson's friends from whom he obtained the PCP on the day that Wrede was shot, testified for the prosecution on rebuttal. Butler was given immunity with respect to any matters that came out regarding the use and possession or furnishing of PCP. RT at 1305. The trial court pointed out to the jury that Butler had been granted such immunity. RT at 1309. Butler testified as to his own observations of Jackson during the hours preceding the shooting. Butler testified that Jackson had come over to his house to wash walls to work off a

previous debt that Jackson owed him for some PCP. RT at 1312-13. He testified that before he went to pick up Jackson he had obtained two Kool cigarettes dipped in PCP, which he put in his refrigerator. RT at 1314-15. He further testified that he saw Jackson share one PCP cigarette with Brenda Dukes and another woman named Ermalinda. RT at 1316-17. He said that he gave Jackson a second PCP cigarette but did not observe him smoking it. RT at 1318. The prosecutor questioned Butler about his four prior felony convictions for burglary with explosives, forgery, and assault and battery. RT at 1322. Butler testified that his last felony conviction was thirty years ago. RT at 1322.

On cross-examination Klump impeached Butler with various inconsistencies between his initial statement when interviewed by the police, which itself was internally inconsistent, and his statements made after he was granted immunity. RT at 1329-33; 1335-44. Klump pointed out that Butler's testimony changed only when he was granted immunity. RT at 1349. Jackson has not shown that Butler could have been impeached more effectively. It was already clear that Butler was a convicted felon who supplied Jackson with the PCP on the day of the murder. There was no doubt that Jackson was intoxicated, as the prosecutor admitted during his closing argument. RT at 1421. As to whether Jackson was working for Butler in exchange for money or to pay off a pre-existing drug debt, that truly is a tangential issue. Based on the degree to which Butler was impeached through Klump's cross-examination, and the relative insignificance of Butler's testimony, Jackson was not prejudiced by Klump's preparation for Butler's testimony.

E. Officer Mohler

During the guilt phase Officer Mohler testified that the first thing he heard Jackson say when he arrived on the scene of the shooting was "Now, I'm gonna kill all the fucking pigs." RT at 713. On cross-examination Mohler

admitted that Officer Vine, Officer Marinello and he all arrived at the scene at approximately the same time. RT at 722. Klump further elicited testimony from Mohler that he was seventy feet away from Jackson when he heard him make the statement about his intent, while Vine was eighty or eighty-five feet away, and Marinello was a hundred feet away. RT at 723.

Mohler also testified that Vine said something like "shoot him, shoot him," and that Jackson responded by saying "I'll shoot you." RT at 723. Mohler testified that he had been interviewed by the Sheriff's Department and a report had been written up. RT at 729. Klump elicited that despite Mohler's contrary recollection on the day of trial, the report did not indicate that Jackson had used the word "fucking." RT at 730-31. The issue of whether Jackson used profanity or not was characterized by the prosecutor as "superfluous." RT at 1444. As pointed out by the prosecutor, other witnesses heard Jackson used profanity. RT at 1444.

Jackson is correct that his statement regarding his intent to kill the officers was damaging. The prosecutor relied on it to show that Jackson was behaving rationally, and that the shooting was an intentional, premeditated, and deliberated action. RT 1441, 1443-45. The prosecutor pointed out that the jury did not have to guess about what Jackson intended to do with the shotgun because he verbally expressed what he wanted to do. RT at 1443.

The prosecutor also clearly argued that Jackson demonstrated that he knew what he was doing based upon his actions with the shotgun, as Jackson was trying to recock the gun. RT at 1443. The prosecutor also relied on the undisputed fact that when Jackson heard Vine yell for someone to shoot him, Jackson responded "I'll shoot you," as demonstrating that he was capable of a "completely appropriate response." [29] RT at 1445.

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29. The Court does not accept the argument that

In addition the prosecutor pointed out that Jackson was able to identify the threat that the police dog represented and attempted to deal with it by whacking the dog on the head with the butt of the gun. RT at 1445. When the dog continued to approach, Jackson said "I'll kill you dog." RT at 1445. The prosecutor further argued that when Jackson was struggling with the officers on the ground, that he still made an attempt to grab a gun out of Mohler's holster, which demonstrated that Jackson was thinking and knew that he needed another weapon. RT at 1446-47. Thus the statement regarding Jackson's intent to kill the pigs was not the only statement that was utilized to show that Jackson was capable of premeditating, deliberating or intending to kill. Nor was the statement the only indication that Jackson knew he was dealing with a police officer, which was a necessary finding for the special circumstances charges. It had already been shown that Jackson had torn off Wrede's badge from his shirt. RT at 816, 1433.

The prosecutor himself mentioned when going over the slides of the reenactment, that while Mohler heard that particular statement, he did not believe that Vine did. RT at 1449. This served to remind the jury that only one officer heard that particular statement. Prior to that, Klump had already elicited on the cross-examination of Vine that he had never heard Jackson say "pigs," (RT at 679), even though Vine had heard that Mohler had himself reported that he had heard Jackson threaten to shoot the pigs. RT at 680. Furthermore, on redirect examination the prosecutor asked "Now, you don't know whether it [the threat to shoot the pigs] was said or not, but at least you

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when Jackson stated "I'll shoot you," in response to Vine's direction to "shoot him, shoot him," a statement which was confirmed by three separate witnesses, (RT at 664, 723, 748), it was a reactive or reflexive response. Pet'r Br. at 24. Rather Jackson's statement indicates that he was aware of his predicament and the danger he was facing.

didn't hear it; is that correct?" Vine responded, "That's correct." RT at 684. This was clarified even further by Klump on recross-examination when Vine testified: "I'm saying I heard the suspect state, 'I'm going to shoot you, motherfucker, I'm going to shoot you.' I did not hear the suspect say, 'I'm going to kill all the fucking pigs." ' RT at 685. Jackson makes no attempt to tell this Court what cross-examination would have been more effective. He only theorizes that Klump's cross-examination was not effective.

Jackson complains that Klump should have pointed out that Mohler's testimony differed from his original statement with respect to whether Jackson "said" the statement or "screamed" it. However whether Mohler testified that Jackson merely said the statement, when Mohler had earlier reported that Jackson had "screamed" the statement, is of no real importance because one of the other officers who had also been targeted by Jackson explicitly acknowledged that he had not heard Jackson make the statement. Thus the fact that only one officer heard that particular statement was put before the jury. Furthermore, whether or not Klump should have pointed out this inconsistency, is of no effect because on redirect examination the prosecutor quoted from the report, and revealed that the report said "the suspect was screaming out 'Now, I am going to kill all the pigs." ' RT at 734. Thus the inconsistency regarding the manner in which the statement was made was actually before the jury.

While Jackson believes that Klump could have further emphasized this particular discrepancy in the witness testimony regarding Jackson's statement of his intent to shoot the pigs, there is absolutely no evidence that any preparation with respect to the police officers would have rendered a better result. [30/] Therefore Klump's

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30. Klump had instructed Bund to interview all of the witnesses listed on pages 32-35 of the "Murder Book." EHT, vol. 9, at 18; EH Exhibit 5. All of the police

performance with respect to this testimony was not constitutionally ineffective, and even assuming arguendo that it was, Jackson was not prejudiced by Klump's performance with respect to the cross- examination of Mohler.

F. Nurse Osacho [31]

Gerald Osacho, one of the two registered nurses who administered care to Jackson the entire time that he was at the QVH emergency room, was called as a witness by the defense. Osacho testified that Jackson was treated for low blood pressure, (RT at 1055), and that Jackson was strapped down using leather restraints because of safety concerns since he was suspected of being a PCP user. RT at 1055. He further testified that Jackson was in a "shock-like condition," but he did not believe that he was "in a true shock." RT at 1072. Osacho testified that Jackson exhibited signs consistent with drug use. RT at 1072. He later characterized it as "an altered level of consciousness with a low blood pressure." RT at 1074. Osacho recollected that Jackson became fully responsive sometime

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witnesses who responded to the crime scene were listed there. EH Exhibit 57, at 35-36. Bund was fully aware of the difficulty that he would encounter in interviewing any of the police witnesses in a case involving the shooting of a police officer. Bund Dep. at 32-33. Nevertheless Bund made an effort to contact the police witnesses by written correspondence, and possibly telephone calls, although the effort was futile as not one officer agreed to be interviewed. RT at 33, 126-128. This scenario cannot be attributed to any failure on Klump's part with respect to his cross-examination of the police witnesses.

31. To the extent that this claim overlaps with Jackson's claim that Klump failed to move to suppress the statements Jackson made in the hospital, this aspect of the claim is analyzed under claim 3(C).

after 3:00 p.m., at which time Jackson admitted that he had smoked PCP earlier that day. RT at 1072-73.

Jackson complains about some additional testimony that came out while Klump was questioning Osacho. Osacho testified that either Jackson had asked if he had killed a policeman, or he had responded to a question posed to him by the West Covina police officer who was present when Jackson regained consciousness and first became verbal. RT at 1057, 1060. This Court agrees withe the California Supreme Court's characterization of Osacho's testimony on the discussions between the officer and Jackson as confused and ambiguous. Jackson, 49 Cal.3d at 1190, 264 Cal.Rptr. 852, 783 P.2d 211. When asked about Jackson's first statement upon becoming "verbal," Osacho testified: "I can't recall the very first thing. The first thing that pops into my mind is I believe it was the West Covina police officer asking him if he knew what he had done or maybe Mr. Jackson posing the question, 'What did I do?' Or--I think it was--my first recollection of him speaking in a lucid manner was conversing with the policeman and the policeman asking what had he done and him responding ..." RT at 1057. Osacho testified that one of the first lucid statements Jackson made was in response to a question posed by the police officer to the effect of "Do you know what you did," or "Do you know why you're here." RT at 1060. He then testified as to how Jackson answered the question: "If I'm not mistaken, he said, 'I shot' or 'I killed the policeman.' Posing a question to the officer." RT at 1060.

On cross-examination the prosecution used the sheriff's report written by Officer Guzman and Officer Muniz to refresh Osacho's recollection. RT at 1063; EH Exhibits 19, 203. Osacho testified that Jackson's first words were responses to Osacho's questions, and Jackson answered the questions by furnishing his name and admitting that he had taken PCP. RT at 1064. Then Jackson answered some questions posed by the police officer regarding personal, identifying information, such as his name, age, date of birth,

address, phone number, the names of the individuals he lived with, and his mother's name. RT at 1064-65; EH Exhibits 19, 203. When questioned about the statement contained in the police report, that right before 4:00 p.m. Jackson had asked the spontaneous question: "Why am I under arrest? Are you charging me with killing a cop?" Osacho testified that the police report coincided with his recollection. RT at 1065.

While Klump was aware that Jackson had made the spontaneous statement regarding why he was under arrest and what he was being charged with, he called Osacho because he believed it would be helpful to show that Jackson's first statements were questions as to what had happened, which would demonstrate that he did not remember what had occurred. EHT, vol. 9, at 63. In addition, Osacho could also testify as to Jackson's altered form of consciousness while Jackson was under his care, and that he remained in such a state for about an hour and a half. EHT, vol. 9, at 63-64. Klump was aware that Osacho could testify about Jackson's spontaneous statement, and was somewhat concerned that it could show that Jackson did make such a statement. EHT, vol. 9, at 66-67, 148-49. However, Klump also believed that the statement was in the form of a question, which could prove to be to Jackson's benefit. Klump testified that he weighed the risks versus the benefits of calling Osacho before he made the decision to do so. EHT, vol. 9, at 66-67. The Court notes that of all the medical personnel at QVH, Osacho was the only person who stayed with Jackson throughout his entire stay at QVH and observed Jackson when he began to respond verbally. RT at 1054. Thus, there was good reason to put Osacho on the stand.

It is true that Osacho testified that he could not be sure regarding the specifics of Jackson's medical condition or the exact times with respect to the levels of Jackson's consciousness without referring to his medical chart, (RT at 1052-53, 1057-58), and Klump failed to provide Osacho with a copy of the chart. However, while Jackson focuses upon

the lack of the medical chart, there is no evidence that the chart contained any information about the portions of Osacho's testimony that Jackson views as harmful. Jackson has failed to show that the chart contained information about the questions posed to him by the police officer, his answers to those questions, or his 3:57 p.m. spontaneous statement. As Osacho himself testified: "I felt that I best attend to the medical and nursing problems and let the police officers take care of their business." RT at 1061. Osacho made it clear that he did not make any attempt to remember exactly what was said while Jackson was engaging in a discussion with the police officer, because "my job wasn't interrogating." RT at 1061.

The Court finds that Osacho's testimony was unclear and inconsistent as to whether Jackson's statements, which indicated that he had knowledge of the shooting, were made spontaneously or whether the statements were made in response to questions posed by the police officer. Therefore Jackson has failed to show that Klump's failure to prepare Osacho deprived him of a fair trial, or made the result of his trial unreliable. Strickland, 466 U.S. at 687.

G. Nurse Whittington

Letitia Whittington was the other registered nurse who was on duty in the emergency room at QVH when Jackson was brought in. She testified that Jackson was exhibiting signs of shock, and appeared to be under the influence of some type of drug. RT at 1082. Whittington left at the end of her shift before Jackson started talking. RT at 1083.

Jackson claims that he was prejudiced based upon Klump's inadequate preparation of this witness. Jackson has failed to show what he believes Whittington could have testified to if she had been prepared differently. Therefore Jackson has failed to show that he is entitled to relief on this aspect of the claim.

What is clear concerning all these witnesses is that Klump was relying on a qualified investigator who was instructed to find and interview all witnesses.

XIII. Claim 3(K): Failure to Call a Key Witness for Reasons That Were Not Grounded in Fact or Law[32]

Approximately five months before jury selection began in Jackson's case, the trial court appointed Dr. John Mead, a forensic psychiatrist, to examine Jackson. Dr. Mead was prepared to testify that: "[a]t the time of the commission of the alleged offense, Mr. Jackson was grossly intoxicated with PCP. He has little recollection of the day's proceedings," which would have been helpful in the guilt phase of Jackson's trial. EHT, vol. 9, at 36; EH Exhibit 15. Jackson claims that Klump performed ineffectively because he failed to call Dr. Mead to the stand in both the guilt and penalty phases.

However, the report also indicated that "Michael shows no signs of major mental illness," that Jackson was sane at the time of the offense, and that he was competent to stand trial. EHT, vol. 9, at 36, 39; EH Exhibit 15. The report further stated that "[a]ny psychiatric diagnosis would be within the realm of character pathology." EHT, vol. 9, at 40; EH Exhibit 15. Klump reasonably viewed these conclusions as harmful to Jackson's PCP defense. EHT, vol. 9, at 39-40. While he had hoped for a mental illness diagnosis which would support Jackson's mental state/intoxication defense, Dr. Mead's report negated any

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32. To the extent that Jackson appears to be contending here that Klump was ineffective for failing to present Dr. Skrdla's testimony, the claim was never included as part of claim 3(K) in the Amended Petition. Accordingly this expanded sub-claim is not properly before the Court and will not be considered. See Cacoperdo, 37 F.3d at 507.

such finding. EHT, vol. 9, at 40. Moreover, Klump feared that the reference to "character pathology" in Dr. Mead's report would "open up the door for all the bad things Mr. Jackson ha[s] done in his past." EHT, vol. 9, at 40.

Approximately half of Dr. Mead's report addressed Jackson's mental state at the time of the crime, and his ability to stand trial. The remainder of the report was devoted to Jackson's background, and included information on his personal or family history. Klump did not expect this information to be in the report because he had not requested it, nor did he expect Dr. Mead to interview Jackson's family members, which in fact Dr. Mead did. EHT, vol. 9, at 40-41.

Klump found that the background section of Dr. Mead's report would be harmful to Jackson as it reported: (1) his history of drug abuse; (2) his criminal history; (3) his military history which included a dishonorable discharge; (4) his only prior instance of unconsciousness was not related to PCP drug use; (5) he remembered a prior bad experience with PCP in which he felt his house was "charged with electricity;" [33] and (6) his past altercations with police officers. EHT, vol. 9, at 36-40; 65-66. Klump believed this information should not be presented to the jury to make a determination as to whether Jackson was under the influence of PCP at the time of the shooting. EHT, vol. 9, at 37. Thus the report was mixed, it contained one helpful section regarding Jackson's intoxication and inability to recall the day of the shooting, and it was full of information Klump viewed as harmful. EHT, vol. 9, at 41.

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33. Klump thought the report's revelation that during a bad trip with PCP Jackson appeared to remember feeling that the house was charged with electricity would be harmful because it demonstrated Jackson had memory of that PCP-induced incident. EHT, vol. 9, at 38-39; EH Exhibit 15.

A. Decision Not to Call Dr. Mead as a Witness in the Guilt Phase

During the course of the guilt trial, before calling Dr. Mead, Klump made a motion in limine to preclude the admission of information contained in Dr. Mead's report that was relevant only to the penalty phase. RT at 1281. The prosecution objected to any determination on the admissibility of portions of Dr. Mead's report without being given an opportunity to review the report itself. RT at 1287-88. The trial court agreed and informed Klump that he would have to show the report to the prosecutor before the court would rule. RT at 1288. Klump refused and the trial court denied Klump's motion. RT at 1288. Klump made it clear that he chose not to present Dr. Mead during the guilt phase based upon the trial court's ruling. [34] RT at 1289.

For this Court's purposes the first question is whether Klump was ineffective for not explicitly instructing Dr. Mead not to include background information in the report. Neither the brief letter nor the Superior Court Letter of Psychiatric Appointment that Klump sent to Dr. Mead made any mention of the need for background information. EH Exhibit 12. Rather specific boxes on the form were

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34. During the hearing on the in limine motion Klump recognized that "[i]t would probably have been better if I would have asked Doctor Mead to write two reports, one for the penalty phase and one for the guilt phase ..." RT at 1283. Moreover, Klump conceded that if he were to try this case again, he would give the experts explicit instructions to produce two reports, one on the background information and one on the psychiatric information. Klump Dep. at 157. However, Strickland dictates that the court "eliminate the distorting effects of hindsight ... and evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

checked off, which indicated precisely the type of information that was being requested. Klump admits he was surprised to see the background information included in the report. EHT, vol. 9, at 40-41. The Court finds that an attorney ought to be able to rely upon the competency of a psychiatrist to understand what is required to come to a conclusion regarding the mental capacity of a defendant. While ultimately it was shown that Klump would have been well advised to specifically instruct Dr. Mead as to exactly what type of information he wanted included in the report, Klump's reliance on the professionalism of the psychiatrist does not make him ineffective. Hendricks, 70 F.3d at 1038.

Even if the Court were to assume arguendo that Klump's actions in requesting the report did in fact constitute ineffective assistance, Jackson's characterization of the degree to which the report of Dr. Mead would have assisted his case is greatly exaggerated. It is true that Dr. Mead would have provided his opinion that Jackson was "grossly intoxicated with PCP," and had "little recollection of the day's proceedings." EH Exhibit 15. This was the only testimony that Klump originally wanted Dr. Mead to present. EHT, vol. 9, at 44-45.

Jackson's intoxication with PCP on the day of the shooting had already been the subject of extensive testimony. As for Jackson's memory of the day's events, Jackson testified that he did not recall anything after smoking a third "super cool." [35] RT at 1225. This testimony was supported by Dr. Aniline, who testified that in certain doses PCP "always produces the amnesia," and that PCP "is very often associated with partial memory states." RT at 1168; see also RT at 1174, 1181. Thus the testimony was presented. Whether it was effectively refuted does not reflect upon Klump's decision not to present Dr. Mead, when to do so would have meant that the prosecution

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35. Jackson testified that a "super cool" as a cigarette dipped in PCP. RT at 1218.

would have access to some information that was helpful to their position.

This appears to be a point that Jackson has overlooked. Klump had some strategic reasons which supported his decision not to present Dr. Mead. Klump testified at the evidentiary hearing that if Dr. Mead had been called to testify at trial, Klump would have been required to furnish the report to the prosecution. He feared that the report would lead the prosecution to additional information that would prove harmful to Jackson's case, information which was discussed at length in the background section of the report. EHT, vol. 9, at 44-46. While Jackson insists that the prosecution already possessed all of the information, the record indicates otherwise. See RT at 1288. The prosecution did possess the military records, (RT at 1282), and only indicated that if Dr. Mead were to testify the prosecution would cross- examine him on whether he interviewed the family. RT at 1287-88. Clearly the prosecution did not yet have a report that indicated that Jackson's prior drug use had not resulted in a failure of memory and that he had no signs of mental illness but only character pathology. EH Exhibit 15.

In addition, the Strickland expert did acknowledge that the report's inclusion of Jackson's statement that he had never shot a "shotgun" could be viewed with concern by an attorney when Dr. Aniline had previously testified that a person under the influence of PCP could fire a gun if familiar with such an activity. EHT, vol. 7, at 35-36. Similarly, the Strickland expert conceded that an attorney would have to weigh the risk of putting on an expert who had diagnosed a defendant with what could be viewed as an antisocial or sociopathic personality. EHT, vol. 7, at 41. This further supports this Court's finding that Klump had a valid strategic reason for not presenting the testimony of Dr. Mead. When the possible risks are balanced against the possible value, it was not an unreasonable decision.

B. Decision Not to Call Dr. Mead as a Witness in the Penalty Phase

Once the case proceeded to penalty phase, Klump decided not to call upon Dr. Mead to testify. Klump testified that the only purpose for which he ever planned to use Dr. Mead was for his opinion that Jackson was "grossly intoxicated with PCP" at the time of the murder, and had no memory of the shooting. EHT, vol. 9, at 45. Klump noted that this defense had already been rejected by the jury. EHT, vol. 9, at 45. The only other testimony that Dr. Mead could testify to would be the harmful background information outlined above. Klump viewed this information, in its totality as more harmful than helpful to the defense case in the penalty phase. EHT, vol. 9, at 252. Moreover, Klump determined that such testimony would be cumulative, (EHT, vol. 9, at 45), and a "repetition of some of the negative aspects of Mr. Jackson's life style" would only go to support the prosecution's position in the penalty phase. EHT, vol. 9, at 252. There is one reference in Dr. Mead's report of Jackson's desire to participate in a sodium amytal interview, for the purpose of showing that he would not have killed anyone. However this self-serving expression of Jackson's inability to accept responsibility for his actions would have had little or no value as mitigating evidence. There is no support for Jackson's claim that the failure to present Dr. Mead's testimony prejudiced him during the penalty phase. Dr. Mead could not have testified to anything relevant to the penalty phase.

XIV. Claim 3(L): Failure to Investigate or Use Available Mitigating Evidence at the Penalty Phase of Trial

Jackson contends that Klump failed to present the available mitigating evidence to the jury. As a result the jury did not have an accurate picture of Jackson's character and propensities, including his mental health problems.

Jackson relies upon his showing that the penalty phase investigation was conducted in an expedited manner, and that Klump did not explicitly direct the investigator's efforts in his investigation. However, the dispositive issues are not when the penalty phase investigation commenced, or when it was completed, but rather why it was conducted in the manner in which it was, and what resulted from the investigation. Nor is the investigative file's size indicative of the efforts made, or whether trial counsel's efforts were constitutionally inadequate. Neither is the investigator's opinion as to the state of the penalty phase investigation particularly relevant to the issue of whether trial counsel met the constitutional level of representation.

Jackson points out that one day Klump telephoned Bund, his investigator, and informed him that Jackson's mother and wife were at the courthouse and suggested that it would be a good time for an interview. Bund Dep. at 234. Jackson complains that this was not an "arranged interview or part of any concerted penalty phase investigation." Pet'r Br. at 48. He then contends that some of the mitigating evidence was not readily accessible to Jackson's mother and wife, since the interview took place at the Office of the Public Defender. Pet'r Br. at 48-49. How the interview was arranged bears no relation to what type of investigation was conducted, which should be the focus of this claim. Jackson also contends that Klump spent very little time preparing his only two witnesses to testify during the penalty phase. This Court has gone beyond the initial issue to examine whether the investigative efforts made here prejudiced Jackson.

It is clear that Klump was faced with a substantial amount of harmful evidence that would require some effort to keep from the jury's review. Jackson had a lengthy adult and juvenile criminal history, a long history of drug abuse, a poor school record, and a dismal military record. Preliminarily the Court agrees with Klump's overall assessment that there was nothing helpful in Jackson's

school or military records. [36] Klump's strategy was necessarily reduced to an attempt to shield the jury from as much harmful information as possible. As Klump acknowledged, in terms of mitigating evidence, he "didn't have much." EHT, vol. 9, at 88.

A. The Mitigating Evidence That Was Presented at the Penalty Phase

During the penalty phase the following evidence in mitigation came out through the testimony of Sabrina Jackson, Jackson's estranged wife: (1) Jackson was a good father who loved his children; (2) he provided for his children when he was working; (3) he was separated from his wife due to his problems with using drugs; and (4) he was a good person who tended to mind his own business. RT at 1560-65. Ms. Jackson further testified regarding two incidents in which Jackson lost control while using PCP. RT at 1564. In addition she testified that she felt the guilty verdict was "unfair" because the jury did not appear to take the fact that Jackson was under the influence of PCP into consideration. RT at 1566-67. On cross-examination Ms. Jackson revealed that Jackson (1) was dishonorably discharged from the army; (2) that he entered the army in an attempt to "get himself straight"; (3) that he had gone to state prison for burglarizing a savings and loan institution; and (4) that he had been arrested from time to time on PCP charges. RT 1569-72.

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36. Klump reviewed Jackson's juvenile records, although he did not find anything that he believed would be helpful in those records. EHT, vol. 9, at 92. Klump also reviewed Jackson's military records, and found that they would also be harmful to Jackson's case due to the undesirable discharge and the report of sodomy. EHT, vol. 9, at 93-94.

During the testimony of Jackson's mother, Lillian Williams, the following information was presented to the jury: (1) during Jackson's formative years his father was "in and out" of his life; (2) Jackson's father was "a hustler, gambler, a street person"; (3) Jackson's father, who lived in Los Angeles, didn't care about Jackson and had not visited him at the jail; (4) Jackson had six biological siblings and six step-siblings; (5) Jackson started sniffing glue at age fourteen; (6) his mother did not know if he started sniffing glue because of her marriage to Jackson's stepfather or due to getting a whole new family; (7) Jackson never gave his mother any trouble with respect to school; (8) he won various trophies in sports; (9) he entered the army to try and make a new start in his life; (10) Jackson was sick and needed help; (11) his mother had done everything in her power to help him; (11) Jackson had not told his mother about his dishonorable discharge from the army; and (12) Jackson was two different people when he was on drugs and when he was off. RT 1575-82.

During cross-examination Mrs. Williams testified that during the last few years Jackson had not held a job for very long. RT at 1583. She further revealed that Jackson had spent the tenth grade in custody due to a robbery in which he used a knife, and that he dropped out of school after being released from custody. RT at 1584, 1587. He was also involved in a burglary and theft in which he displayed a handgun, and grand theft person. RT at 1584- 86. Mrs. Williams testified that she believed all these offenses were drug- related. RT at 1584-86.

Jackson makes no attempt to tell this Court what favorable evidence Jackson's mother or estranged wife had that was not presented to the jury. The cross- examination was the risk any counsel takes in presenting evidence favorable to his or her side of the case.

B. Evidence of Family Background

Jackson complains that his family life and background were not adequately investigated. As a result the jury did not hear details with respect to Jackson's pre-existing impairments rendering him susceptible to drug abuse, the prevalence of drug use in his neighborhood, and the difficulties he encountered within his own household. Am. Pet. at 53. Jackson contends that Klump: (1) only interviewed his mother and wife and failed to interview any other member of his family; (2) does not remember talking to Jackson himself about his background; and (3) failed to follow up on a witness, a former coach, that Jackson's mother said would be able to provide favorable testimony for Jackson.

At the penalty phase the only witnesses Klump put on was Jackson's mother and wife. Jackson contends they were not adequately prepared to testify on his behalf since they were only interviewed by Klump the morning before they testified. Am. Pet. at 53. Jackson contends that if an adequate investigation had been conducted, evidence of his turbulent family history and the beatings he received at the hands of his mother and step-father and its affect on Jackson would have been presented at the penalty phase.

Klump believes that he interviewed Ms. Williams prior to putting her on the stand. He advised her to testify about Jackson's work history and problems he had during childhood. He recommended that she steer clear of general character evidence, since that could "open the door" to bad character evidence about Jackson. EHT, vol. 9, at 89-90. Klump also believes he interviewed Ms. Jackson prior to having her testify, and that he discussed the same concerns regarding character evidence with her. EHT, vol. 9, at 90.

It is apparent that for whatever reason, Bund's original efforts to investigate mitigating evidence were not successful. Bund interviewed both Mrs. Williams and Ms. Jackson. Bund found it difficult to communicate with Mrs. Williams,

and testified that "they [Mrs. Williams and Ms. Jackson] had trouble understanding the magnitude of this particular situation and how important it [the penalty investigation] was." Bund Dep. at 48. Bund testified that although he cannot specifically recall, he believes he would have reported the difficulty he had during the interviews of Mrs. Williams and Ms. Jackson to Klump. EHT, vol. 10, at 56. Klump could not recall that Bund ever received the information Bund had requested of Jackson's mother, specifically the name and address for Jackson's coach, and the names, addresses and telephone numbers for all of Jackson's relatives. EHT, vol. 9, at 88-89; Bund Dep., at 42-47. Whether or not Jackson's family members were forthcoming with helpful mitigating evidence, ultimately the issue of ineffective assistance of counsel comes down to whether there was in fact helpful mitigating evidence available. Jackson has given this Court no evidence that other family members possessed favorable evidence that Jackson's mother and wife could not have supplied.

It is also clear that Jackson was not a source of mitigating evidence. Klump testified that he shared his investigator's report on Jackson's family, school, employment and military history with Jackson, although his recollection is that Jackson did not give him the names of additional witnesses that Jackson wanted interviewed. EHT, vol. 9, at 89; EH Exhibit 24. Jackson did not volunteer any additional information, in terms of witnesses for the penalty phase, he simply referred Klump to his mother and his wife. EHT, vol. 9, at 251, 258- 59.

In addition, if Jackson had in fact furnished leads to Klump, Klump testified that the leads would have been forwarded to Bund in some type of an investigation request. Klump Dep. at 362. A review of the investigation requests do not reveal any such leads. EH Exhibit 419. On the other hand, Jackson testified that Klump did not ever discuss the investigation requests or reports with him, never discussed his family or personal background or its relevance to the penalty phase, nor did he ever explain the penalty

phase to Jackson. EHT, vol. 11, at 7-8. Thus there is dispute as the whether Jackson was consulted as part of the penalty phase investigation or not, which turns on the credibility of the witnesses. The Court finds that Jackson was consulted regarding mitigating evidence, (EHT, vol. 9, at 258), as the only evidence presented to the contrary was the testimony of Jackson himself, who testified that no such consultation occurred, twelve years after the trial took place. This Court points out that "the 'reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ' Langford, 110 F.3d at 1386-87 (quoting Strickland, 466 U.S. at 691).

The crucial question then becomes whether there was additional mitigating evidence available, that would have been discovered if additional investigative efforts had been made. The evidence that Jackson contends could have been discovered was his difficult childhood and the allegations of child abuse. However, his wife, to whom he was married for ten years at the time of his trial, was in a position to observe Jackson's interactions with his mother, step-father and the other members of Jackson's family and did not report ever seeing any signs of family disharmony. S. Jackson Dep. at 50-52, 54-55. Jackson never made disparaging remarks about his mother to Ms. Jackson, and Ms. Jackson had observed Jackson's mother express her affection for Jackson through both terms of endearment and affectionate gestures. S. Jackson Dep. at 64-65, 94. Nor had Ms. Jackson ever noticed any type of friction between Jackson and his stepfather. S. Jackson Dep. at 65, 94. Ms. Jackson also testified that Jackson had never mentioned being unduly or excessively disciplined as a child, nor did he ever tell her that his childhood had been bad. S. Jackson Dep. at 68-72.

Ms. Williams testified that she considered Jackson's step-father, Arthur Morrissette, to be a good father and that Jackson appeared to like him. L. Williams Dep. at 158-59. While she recalled that Arthur had physically disciplined Jackson on occasion she testified that such discipline did not

occur more than once a week and she did not recall ever seeing any bruises as a result of the discipline. L. Williams Dep. at 161-62. At the time Arthur Morrissette left the household, Jackson was six years old.

Mrs. Williams admitted to disciplining Jackson often when he was young, and reported that she would hit him with whatever she had in her hand. L. Williams Dep. at 163. The discipline was always in response to something Jackson had done, and while she stated that it was possible that she hit him more than fifteen times in a single incident, she never saw any bruises result from the discipline, nor was an medical attention necessary. Id. at 164. Mrs. Williams does not believe that Jackson was hit any more than any of the other children, and she was never told by anyone that she was disciplining her children too much. Id. at 165. In addition she recalls that when Jackson was six or seven years old, she choked him on various occasions. Id. at 169-70. She testified that this probably occurred on not more than ten occasions. Id. at 170. Jackson never blacked out from these incidents, and after Mrs. Williams stopped he would resume breathing and start crying. Id. at 171-72.

This is the state of the evidence properly before this Court. [37] While the penalty jury was not aware of any of

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37. While there were declarations filed by various members of Jackson's family, the contents of the declarations was admitted only as a basis for the opinions of expert witnesses, not for the truth of the matter asserted. Moreover there are significant discrepancies in the declarations regarding the degree of discipline Jackson was subjected to, whether he was singled out for such discipline, as well as whether Jackson's step-father ever disciplined him. In fact any allegations that Jackson was physically abused by his step-father were sufficiently refuted by the declarations furnished by his step-father, Arthur Morrissette, Sr., and two of Jackson's sisters, Pamela Jackson and Patricia Williams. Therefore the

the incidents involving choking of Jackson by his mother, which apparently were the frustrated attempts at discipline by a single mother, (L. Williams Dep. at 170-72), this evidence is not of the magnitude that would have resulted in a different verdict in the penalty phase. See, e.g., Campbell v. Kincheloe, 829 F.2d 1453, 1464 (9th Cir.1987), cert. denied, 488 U.S. 948, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988). There is no evidence that these instances of choking were medically documented in any way, nor is there any kind of a link between the alleged abuse Jackson was subjected to and the circumstances of the crime, beyond that of Jackson's impairment due to PCP intoxication, which had previously been rejected by the jury in the guilt phase.

It appears that Klump interviewed both Jackson's mother and wife before they testified. The issue then becomes whether additional efforts would have elicited favorable testimony from the witnesses who knew Jackson best. Jackson has not demonstrated what preparation of these witnesses would have resulted in more favorable testimony. The testimony that was presented was a valid attempt to "humanize" Jackson before the jury, and emphasized that Jackson's problems stemmed from a long battle with drugs, despite his efforts to straighten out his life by entering the military. Moreover, the Court has already found that further investigation would not have revealed sufficient evidence in mitigation to permit Jackson relief on this claim. Thus there is no basis for finding that Jackson was prejudiced by the extent to which Klump prepared his two penalty phase witnesses to testify.

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alleged instances of physical abuse referred to by various members of Jackson's family are both unsubstantiated and factually disputed. The conflicting evidence offered in the declarations would hardly be useful in the penalty phase of the trial in light of the testimony of Jackson's mother and wife.

Even if the claim that harmful testimony was presented by Jackson's mother and wife as a result of inadequate preparation were before the Court, Jackson has not demonstrated that an objection to the testimony regarding juveniles crimes would have been sustainable. First, the references to the juvenile crimes, which were elicited on cross-examination of Jackson's mother and wife, were to the following instances of juvenile crime: (1) a robbery committed with a knife; (2) a burglary and a theft involving the display of a hand gun; and (3) grand theft person. RT at 1570-72; 1584-86.

These instances all qualify as "evidence of violent juvenile conduct that would have been a crime if committed by an adult [which] is admissible under section 190.3, factor (b)" of the California Penal Code. People v. Avena, 13 Cal.4th 394, 426, 916 P.2d 1000, 1018, 53 Cal.Rptr.2d 301, 319 (1996), cert. denied, 519 U.S. 1063, 117 S.Ct. 700, 136 L.Ed.2d 622 (1997); see also People v. Burton, 48 Cal.3d 843, 862, 771 P.2d 1270, 1282, 258 Cal.Rptr. 184, 196 (1989) (finding that "the use of prior violent juvenile misconduct as factor (b) criminal activity" under California Penal Code § 190.3 is permitted), cert. denied, 494 U.S. 1039, 110 S.Ct. 1502, 108 L.Ed.2d 637 (1990).

Moreover, the testimony was not beyond the scope of cross-examination, since Jackson's mother had testified that Jackson "went through school--I never had no trouble with him in school." RT at 1578. On cross-examination Jackson's mother admitted that he spent the tenth grade in custody, as a result of his committing robbery with a knife. RT at 1584. The other incident regarding burglary and a theft in which he displayed a hand gun, as well as Jackson's conviction of grand theft person, was similarly within the scope of cross- examination.

Nor is the fact that Jackson's wife testified about his two bad experiences with PCP particularly harmful, as it was only cumulative to the testimony regarding his extensive PCP usage which was admitted during the guilt phase. Klump testified that one of the experiences would have been

harmful as there was some indication that Jackson had remembered the event in which he believed his house was charged with electricity. This "electricity" episode would have cast doubt on his PCP defense, which was premised upon his testimony that he did not remember anything about the shooting of Wrede. EHT, vol. 9, at 37- 39. However, whether Jackson had memories of events that occurred while he was intoxicated with PCP at a time other than at the time of the events in this case was not an issue in the penalty phase.

The fact that the football coach Jackson's mother had mentioned as a possible source of mitigating evidence was not contacted does not support a showing of ineffective assistance of counsel. Bund indicated that Jackson's mother believed the football coach thought highly of Jackson, and mentioned that Jackson had received some trophies for his accomplishments in sports. Bund Dep. at 45-46. However, this was simply character evidence, and cumulative as Jackson's mother testified with respect to his achievements in various sports while he was in school. RT at 1578.

Klump did not consider presenting evidence of the availability of drugs in Jackson's neighborhood, believing that it would be harmful to his case. EHT, vol. 9, at 91. Due to the extent to which Jackson's drug problem was presented to the jury, Klump's decision appears reasonable. Any evidence with respect to the widespread problem of drug abuse in Jackson's neighborhood would simply have been cumulative and moreover, irrelevant.

C. Evidence of Mental Health Problems

Jackson complains that Klump failed to obtain his juvenile records which contained a 1970 report which diagnosed him as a latent schizophrenic, and reported that he had an IQ of 76, which is well below average. Am. Pet. at 57. However Klump did request that two court-appointed psychiatrists examine Jackson to make a determination as to: (1) Jackson's sanity; (2) whether he

was capable of forming the specific intent to kill; and (3) whether he could deliberate, premeditate and deliberate. EHT, vol. 9, at 27. For these purposes Dr. Blake Skrdla and Dr. John Mead were appointed. Klump wanted two psychiatrists because he believed that it would carry more weight if he could show that two psychiatrists came to the same conclusions regarding Jackson. EHT, vol. 9, at 27. Neither Dr. Skrdla nor Dr. Mead were asked to include Jackson's background history in his reports. EHT, vol. 9, at 28, 35.

When Klump examined Dr. Skrdla's report, he determined it would be harmful to Jackson's case, since it stated that Jackson possessed the mental capacity to form the specific intent to kill and actually formed such intent, although he "was not believed to have actually deliberated, premeditated, nor meaningfully and maturely reflected upon the gravity of his contemplated acts." EHT, vol. 9, at 30, 188; EH Exhibit 13. In addition Dr. Skrdla's report stated that Jackson was capable of harboring malice aforethought. EHT, vol. 9, at 30; EH Exhibit 13. The report further concluded that there was "[n]o clinical evidence suggestive of organic brain disease or functional psychoses was observed." EHT, vol. 9, at 31; EH Exhibit 13.

Dr. Mead's report contained an opinion that Klump thought would be helpful to Jackson's case: "[a]t the time of the commission of the alleged offense, Mr. Jackson was grossly intoxicated with PCP. He has little recollection of the day's proceedings." EHT, vol. 9, at 36; EH Exhibit 15. The report also indicated that Jackson "shows no signs of major mental illness." EHT, vol. 9, at 39; EH Exhibit 15. As discussed supra, Klump found that the background section of Dr. Mead's report would be harmful regarding his history of drug abuse, his arrest history and his military history which included a dishonorable discharge. EHT, vol. 9, at 37. Klump believed this information should not be presented to the jury to make a determination as to whether Jackson was under the influence at the time of the shooting. EHT, vol. 9, at 37. Dr. Mead's report also pointed out that

Jackson had only suffered one prior instance of unconsciousness, and that incident was not drug-related. Klump reasonably believed this was harmful evidence because it would negate finding that Jackson was unconscious during the shooting of Wrede. EHT, vol. 9, at 38-39; EH Exhibit 15. Similarly Klump thought the report's revelation that during a bad trip with PCP Jackson remembered feeling that the house was charged with electricity would be harmful because it demonstrated he had memory of that PCP-induced incident. Id. The portion of the report discussing Jackson's problems with police officers was also reasonably viewed as harmful by Klump. EHT, vol. 9, at 39; EH Exhibit 15.

In addition to having two psychiatrists appointed, Klump also requested that an electroencephalogram ("EEG") be performed on Jackson. The results of both the alcoholinduced EEG and the normal EEG revealed nothing out of the ordinary. EHT, vol. 9, at 33; EH Exhibit 14. Neither Dr. Mead, nor Dr. Skrdla suggested that any other testing should be performed on Jackson. EHT, vol. 9, at 32, 42.

The fact is Klump had access to two contemporaneous opinions from two different psychiatrists which resoundingly concluded that Jackson showed no signs of major mental illness. Klump's reliance on these two separate psychiatric reports was not unreasonable. Klump testified that based upon those two reports, he did not believe further investigation was necessary regarding whether Jackson suffered from schizophrenia. EHT, vol. 9, at 85-86.

In light of the two contemporaneous psychiatric reports, a report indicating that "one will expect him to develop stronger schizophrenic tendencies" which was rendered when Jackson was sixteen years old, would have been of little value in Jackson's penalty trial. See EH Exhibit 293. Moreover, Dr. Skrdla's report clearly indicated that none of Jackson's family members had received psychiatric care. EH Exhibit 293. Dr. Mead's report notes that Jackson believed he saw a psychiatrist when he was about fifteen

years old, although Jackson believed that a psychiatrist was consulted as a result of his drug use. EH Exhibit 15.

Jackson criticizes counsel for failing to furnish Dr. Skrdla and Dr. Mead with the 1970 report. Yet Dr. Mead was aware that a psychiatrist had been consulted in some capacity and neither psychiatrist requested additional information in order to render their respective professional opinions. This case is distinguishable from Clabourne on the basis that therein the psychiatrists, although not provided with sufficient background materials needed for their opinions, had very serious doubts regarding the mental state of the petitioner. At the evidentiary hearing held by the district court in Clabourne, one psychiatrist testified that the petitioner " 'probably [had] suffered from a psychosis," ' and that if he had been provided with all the necessary background materials, "he 'probably would have testified that [Clabourne] had schizophrenia." ' Clabourne, 64 F.3d at 1385. The other psychiatrist testified at the evidentiary hearing that Clabourne " 'suffer[ed] with a chronic process thought disorder,' specifically some form of schizophrenia." Id. at 1386. Here there is not sufficient evidence that Jackson was schizophrenic at the time of the penalty phase, or that the two psychiatrists would have changed their professional opinions of Jackson's mental condition in 1984 based upon a report rendered fourteen years earlier.

The Court notes that neither psychiatrist recommended that Jackson be subjected to further psychiatric testing, nor did the EEG tests requested by Klump reveal any abnormalities. There is no basis to find that Klump was under an obligation to seek yet another opinion from a psychiatrist regarding Jackson's mental condition. See Morgan v. Bunnell, 24 F.3d 49, 52 (9th Cir.1994). In addition, Dr. Mead reported that both Jackson's mother and estranged wife viewed him as being a victim of PCP. The possibility of other mental disabilities playing a role in the shooting of Wrede was apparently not mentioned by either Jackson's mother or wife when they were interviewed by Dr. Mead.

If Klump had in fact been put on notice that Jackson suffered from some form of mental impairment, then his decision to abandon further investigative efforts would have been questionable. Deutscher v. Whitley, 884 F.2d 1152, 1160-61 (9th Cir.), vacated and remanded on other grounds, Angelone v. Deutscher, 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1989). While Jackson argues the 1970 juvenile report should have prompted Klump to undertake further investigation, Klump testified that he did not find it helpful to the PCP defense. EHT, vol. 9, at 235-237. Since Klump already had two current psychiatric reports which negated any possibility that Jackson currently suffered from any mental disorder, Klump's decision not to pursue the findings of a report rendered when Jackson was sixteen years old was reasonable. Furthermore, Klump testified that he was never told that Jackson had a mental disability or a low IQ. EHT, vol. 9, at 86. He further testified that he did not perceive Jackson as having a mental disability, nor did Jackson ever appear to have problems understanding directions. Id. To the contrary Klump testified that Jackson was "one of the most cooperative and apparently intelligent clients that I've had in the years that I've been practicing." EHT, vol. 9, at 12. Klump never observed Jackson having any trouble reading the reports that Klump gave him to read. EHT, vol. 9, at 12. Based upon the above, the Court finds that Klump's failure to obtain and/or present the 1970 report contained in Jackson's juvenile file was not deficient performance, nor did it result it prejudice. Jackson's testimony before this Court makes evident the error of one who would believe Jackson was not intelligent or had difficulty understanding directions.

D. Investigation of Evidence Admitted in Aggravation During the Penalty Phase

Jackson contends that Klump should have investigated the incident of sodomy, which was admitted as aggravating

evidence against Jackson during the penalty phase. [38] The prosecution produced George Taylor, the victim, as its sole witness on the sodomy incident. Taylor testified that Jackson had been the active participant in the attack in which Jackson forced Taylor to engage in an act of sodomy. RT at 1528-30. This attack occurred while both Jackson and Taylor were in the army, stationed at Fort Knox, Kentucky. RT at 1524. Taylor testified the incident occurred when Jackson was drunk or "high on weed." RT at 1527.

It is true that the only indication that the incident involved actual force was Taylor's testimony that he was slapped by another individual, who was a passive participant to the actual act of sodomy. RT at 1529. However, the military records of the investigation that followed the assault indicate that Taylor was slapped several times during the assault, although he was not injured and did not require medical attention. EH Exhibit 293. While the medical records of Taylor's physical examination, which occurred two or three days after the assault, were lost, one physician who

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38. In the post-hearing briefing Jackson asserts that Klump failed to investigate the only other aggravating evidence introduced by Respondent, which was Jackson's 1983 assault upon Officer Andrew Bennallack, a West Covina police officer. The assault occurred when the Officer attempted to arrest Jackson for being intoxicated with PCP. During the assault Jackson ripped off the police badge from Bennallack's shirt. RT at 1546. The assault left Bennallack with a broken hand and a cracked wrist. RT at 1550. The claim that Klump failed to investigate the incident and that such investigation would have raised serious doubt as to whether force or violence was present, which could have formed the basis for excluding the incident, was not raised in the Jackson's Amended Petition and is not properly before the Court. See Cacoperdo, 37 F.3d at 507.

was interviewed during the military investigation stated that "he found no evidence of forcible entry into Taylor's anal area." EH Exhibit 293. However, since the original standard medical examination record was lost, and the examination occurred several days after the attack, the physician's interview cannot be given undue weight in light of the other evidence contained in the military records.

The prosecutor elicited testimony that Taylor was hurt to the point that he was bleeding. RT at 1531. On cross-examination Klump asked Taylor why he did not report the incident for several days, (RT at 1536), and through Taylor's testimony revealed that while there were apparently four or five other people present in the barracks, no one intervened during the attack. RT at 1535-36. Nevertheless, Jackson's contention that this incident could have been excluded on the grounds that there was inadequate evidence of force involved in the attack is mere speculation.

When Klump questioned Jackson about the incident, he simply stated that the incident did not occur the way in which it was portrayed in the military records. Klump Dep. at 374; EHT, vol. 9, at 244. Jackson did not attempt to provide the names of other witnesses who could have provided testimony which would corroborate his version of the incident. Klump Dep. at 374. In fact, Klump testified that he never ascertained what Jackson's own version of the incident was because Jackson did not want to talk about it. EHT, vol. 9, at 244, 259. When this Court asked Klump whether Jackson had ever told him that any of the witnesses were not testifying truthfully, Klump answered in the negative. EHT, vol. 9, at 258. Similarly Klump did not believe that Jackson had ever told him that he had evidence contrary to that presented by the various witnesses. EHT, vol. 9, at 258.

In other words, counsel was faced with a lack of cooperation from his client. Based upon this lack of cooperation, and in light of the military investigative reports which indicate that the attack was an assault involving force, Klump did not behave unreasonably in failing to conduct a

further investigation. Moreover, this Court finds that any belief that the sodomy incident was not admissible because it did not involve force or violence is simply mere speculation. This is another situation in which "the 'reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ' Langford, 110 F.3d at 1386-87 (quoting Strickland, 466 U.S. at 691).

E. Evidence of Jackson's Good Behavior While Institutionalized

Jackson contends that he had a record of good behavior while institutionalized. Am. Pet. at 53. However no evidence was developed during the evidentiary hearing to support this claim. In fact, the evidence is quite to the contrary. As Respondent points out, Jackson's juvenile records demonstrate that several dispositions were attempted to rehabilitate Jackson including: home on probation, camp, and the California Youth Authority. Resp't Br. at 143. The fact that these attempts were obviously unsuccessful cut against any value they could possibly have as evidence in mitigation. [39] There is no showing that

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39. A Probation Officer's Report filed February 18, 1972 states in part:

> This is minor's fourth appearance before the juvenile court and the third in which either robbery or theft from person has been involved. Minor brings a long record of delinquency and violence in the community and is rapidly elevating himself to the position of menace. He has been known to the courts and probation since June of 1969 and to date no plan of rehabilitation has been successful. Probation, camp, and placement have all been tried but despite these efforts minor again appears for a

Jackson's behavior during the approximately six months he spent in the California Department of Corrections as a result of his participation in a burglary of a Sav-On drug store, or the time he spent awaiting his trial for the murder of Wrede, would have had any effect on the penalty rendered in his case. Assuming a showing of his alleged "good behavior" could be made, this is not the type of evidence which could have made a difference given the degree of aggravating evidence in this case. See, e.g., Campbell, 829 F.2d at 1464.

Taken as a whole, all of Jackson's examples of evidence that could have been presented during the penalty phase cannot be viewed as the type of evidence that reasonably could have resulted in a different verdict in the penalty phase. Jackson is not entitled to relief on this claim.

XV. Ineffective Assistance of Counsel Claims for Which No Evidentiary Hearing Was Sought

Pending before the Court are three sub-claims of ineffective assistance of counsel, claims 3(H), 3(M), and 3(N), for which an evidentiary hearing was neither sought nor necessary. For the reasons set forth below, the Court does not find Jackson is entitled to relief on any of these claims.

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serious offense.
EH Exhibit 62 at 80.

The same report indicated that during a fifteen week period in which Jackson was placed at Camp Munz as a result of a juvenile petition sustaining charges of glue sniffing and robbery, Jackson had "run away from camp five times." EH Exhibit 62 at 84.

A. Claim 3(H): Failure to Present the Jury with Evidence Showing That Jackson Did Not Aim the Shotgun at the Decedent

In claim 3(H) Jackson alleges that Klump failed to present evidence to the jury to demonstrate that Jackson did not aim the shotgun at Wrede. Jackson contends there is evidence which suggests that Jackson's PCP-intoxicated condition caused him to experience "extraordinary irritation" with the flashing light bar on the patrol car, which caused him to take "a reflexive, unthinking shot" at the light bar. Jackson contends the ballistics evidence would have supported the argument that the light bar was actually the target Jackson was aiming at, as only two of the nine pellets struck Wrede, and three to four of the pellets were recovered from the inside of the light bar. Jackson similarly argues there was evidence that the lethal pellet ricocheted before hitting Wrede, which would demonstrate that he did not aim at Wrede. Jackson believes that Klump's investigative efforts with respect to ballistics evidence was constitutionally deficient, and his failure to introduce the evidence demonstrates that Klump did not truly understand the PCP intoxication defense he was attempting to present.

Jackson fails to recognize that the ballistics evidence was already before the jury. Dr. Lakshmanan Sathyavagiswaran, a board certified pathologist who was employed as a deputy medical examiner for the County of Los Angeles, testified at Jackson's trial. RT at 778. Dr. Sathyavagiswaran attributed the cause of death of Wrede as due to a shotgun wound to the head, caused by "lead buckshot-type fragment." RT at 781, 786. Dr. Sathyavagiswaran testified that during Wrede's autopsy two gunshot wounds were found. The first gunshot wound entry was in the left cheek of the face which proved fatal, and the secondary gunshot wound was a graze-type laceration on the top of the head. RT at 781, 785-91.

Sergeant Christansen, a Los Angeles County deputy sheriff assigned to the scientific services bureau as a firearms

identification examiner, testified as to the damage to the light bar caused by the shotgun. RT at 843, 851. He testified that the light bar contained fragments of lead or fragments of buck size shot. RT at 851. On cross-examination Klump questioned Christansen further, who stated that his visual examination revealed that the metal parts found in the light bar appeared to be buck shot, and there were probably three or four pieces of buck shot in the light bar. RT at 862.

As for the evidence regarding Jackson's possible sensitivity to flashing lights and loud noises, Jackson concedes that such information was readily available from Dr. Aniline. Jackson fails to acknowledge that Dr. Aniline was consulted for the purpose of assisting with the PCP defense, and there is no evidence that he ever advised Klump of the possibility that the flashing lights played a significant role in the shooting. To enable him to render an opinion in the case, Dr. Aniline was asked to review, among other things, the murder book and transcripts from Jackson's trial. RT at 1198. Dr. Aniline testified that he had indeed reviewed the trial transcripts. RT at 1198-99. Therefore Dr. Aniline should have been aware of all of the relevant facts, including the testimony of Christansen, the state's expert on the ballistic evidence, who described the damage to the interior of the light bar caused by the shotgun. [40] RT at 843, 851. Klump was entitled to rely upon Dr. Aniline, the expert, to provide the significance of the flashing lights and the finding of three or four shotgun pellets in the light bar.

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40. In addition, the murder book described the condition of the light bar, including the fact that fragments of lead were recovered from the interior of the light bar. EH Exhibit 57 at 68.

Even assuming that Klump should have recognized that a PCP abuser might have a reaction to flashing lights, and should have emphasized that the lead fragments in the light bar supported a finding that Jackson aimed at the light bar and not at Wrede, these omissions did not prejudice Jackson. The Court has already found that there was sufficient evidence of Jackson's ability to premeditate, deliberate and intend to kill to support a conviction of first degree murder. Among that evidence were four different eyewitness accounts that Jackson aimed or pointed the shotgun at Wrede. RT at 495, 544-45, 574, 595-96, 940-41. Therefore Jackson is not entitled to relief as the alleged omissions were not so gross as to undermine confidence in the final outcome of Jackson's trial. See Strickland, 466 U.S. at 694.

B. Claim 3(M): Counsel Failed to Request Appropriate Instructions on Crucial Mens Rea Issues

Jackson contends that Klump failed to object to improper jury instructions. An ineffective assistance claim is not judged by focusing on any one particular act or omission, but rather evaluated in light of counsel's total performance. See Kimmelman v. Morrison, 477 U.S. 365, 386, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). "An ineffective assistance of counsel claim based on counsel's failure to object to a jury instruction requires a showing of prejudice." James v. Borg, 24 F.3d 20, 27 (9th Cir.) (citing United States v. Swanson, 943 F.2d 1070, 1073 (9th Cir.1991)), cert. denied, James v. White, 513 U.S. 935, 115 S.Ct. 333, 130 L.Ed.2d 291 (1994). To ascertain whether the failure to object resulted in prejudice, the court must consider "the totality of the evidence" presented to the jury. United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir.1990) (quoting Strickland, 466 U.S. at 695)); see also United States v. Appoloney, 761 F.2d 520, 522 (9th Cir.) (instructions to a

jury are viewed in the context of the entire trial), cert. denied, 474 U.S. 949, 106 S.Ct. 348, 88 L.Ed.2d 296 (1985).

1. Klump's Failure to Object to CALJIC 3.31 and 4.21

CALJIC 3.31 instructed the jury that "there must exist a union or joint operation of act or conduct and a specific intent in the mind of the perpetrator and unless such specific intent exists the crime to which it relates is not committed." CT at 141. This instruction must be given when a crime is one of "specific intent," such as the crime of murder. People v. Alvarez, 14 Cal.4th 1555, 926 P.2d 365, 58 Cal.Rptr.2d 385 (1996); see People v. Whitfield, 7 Cal.4th 437, 450, 868 P.2d 272, 27 Cal.Rptr.2d 858 (1994). CALJIC 4.21 identified the specific intent elements of the offense to which intoxication evidence is relevant and instructed the jury that it could use such evidence in determining whether the defendant had such specific intent. CT at 142. Thus pursuant to CALJIC 4.21 the jurors were instructed that for the crime of murder, a necessary element was "the existence in the mind of the defendant of the specific intent to harbor malice, premeditate and deliberate." CT at 142.

Jackson contends that when the trial court advised the jury that first degree murder required proof of "specific intent to harbor malice, premeditate and deliberate," pursuant to CALJIC 3.31 and 4.21 (CT at 141-42), it misled the jury by suggesting they determine the existence of "specific intent to harbor malice, premeditate and deliberate" rather than determine whether Jackson actually harbored malice and actually premeditated and deliberated. Jackson complains that the combination of these two instructions could have caused confusion and that Klump was constitutionally ineffective for failing to object to these instructions.

The Court fails to see how these instructions could be viewed as ambiguous as to the necessary finding for first

degree murder, and even assuming arguendo that they were, there is not a "reasonable likelihood" the jury misconstrued the jury instructions as Jackson asserts. Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). This claim rests upon mere speculation, and in light of the strong evidence of Jackson's guilt of first degree murder, falls well short of establishing prejudice from the manner in which CALJIC No. 3.31 and No. 4.21 were given to the jury. See Cooks v. Spalding, 660 F.2d 738, 740 (9th Cir.1981) (mere speculation insufficient to establish prejudice), cert. denied, 455 U.S. 1026, 102 S.Ct. 1729, 72 L.Ed.2d 147 (1982). "There is no reasonable probability that a more precise ... instruction would have affected the outcome of the case." See Chambers, 918 F.2d at 1461. In coming to this conclusion the Court has considered the specific language challenged, the instructions as a whole, and the jury's findings. [41] Jackson has failed to show that Klump "made errors so serious that counsel was not functioning as

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41. The jury has been given CALJIC 8.20, which expressly required intent to kill for murder of the first degree under the theory of willful, deliberate, and premeditated killing. CT 148-49. The jury was also instructed that the state had the burden of proving each of the elements of the crime of murder beyond a reasonable doubt. CT at 140, 146. The jury had further been instructed pursuant to CALJIC 2.02 that while specific intent could be proved by circumstantial evidence, if the evidence was susceptible of two different reasonable interpretations regarding specific intent, the jury was obligated to adopt the interpretation which pointed to the absence of the specific intent. CT at 123. In addition, "the jury was instructed that they must consider the instructions as a whole, each in light of all the others, and that the order in which they were given was of no significance." Jackson, 49 Cal.3d at 1197 n. 7, 264 Cal.Rptr. 852, 783 P.2d 211.

the 'counsel' guaranteed the defendant by the Sixth Amendment," so this claim fails. Strickland, 466 U.S. at 687.

2. Klump's Failure to Request CALJIC 8.73

The jury was given CALJIC 8.42, an instruction which asked the jury to focus on whether there was provocation sufficient to arouse a heat of passion in "an ordinarily reasonable person," which would reduce the offense to voluntary manslaughter. CT at 153-54. Jackson complains that Klump failed to request CALJIC 8.73, regarding evidence of provocation in determining the degree of murder. [42] Jackson claims that due to the omission of that instruction the jury was not instructed on whether Jackson, who was under the influence of PCP, was provoked unreasonably or otherwise, by Wrede's conduct and thus only guilty of second degree murder.

Under Strickland, trial counsel's failure to request a jury instruction is only prejudicial "if it affected the result of the proceedings." United States v. Bosch, 914 F.2d 1239, 1247 (9th Cir.1990). Accordingly, prejudice "will be found only where there is a strong need for the instruction ..." Id. (quoting United States v. Martin, 489 F.2d 674, 677 n. 3 (9th Cir.1973), cert. denied, 417 U.S. 948, 94 S.Ct. 3073, 41 L.Ed.2d 668 (1974)).

The Court finds there is scant, if any, evidence of provocation on the part of Wrede. Provocation was simply

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42. CALJIC 8.73 reads as follows: "When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree."

not a factually supported alternative defense theory in this case such that a pinpoint jury instruction was reasonably necessary. An instruction on the level of provocation required to reduce first degree murder to second degree murder would have had little meaning for the jury. The jury was clearly instructed on the elements of manslaughter, second degree murder, and first degree murder. Had the jury found the evidence insufficient to support the first degree murder charge, it would have done so based on the lack of evidence of intent rather than on nonexistent evidence of provocation. Jackson's assertion that Klump's failure to request this instruction on provocation effectively robbed him of the defense of second degree murder to which he was entitled is therefore incorrect.

Indeed, even if Klump's failure to request this instruction constituted deficient performance, the jury clearly rejected all of the lesser offenses. Therefore any error of failing to instruct the jury further on provocation must be viewed as a non-prejudicial omission, as its omission does not undermine confidence in the final outcome of Jackson's trial. See Strickland, 466 U.S. at 694. [43]

3. Klump's Failure to Request a Gross Negligence Instruction

Jackson alleges that Klump rendered deficient performance by failing to request an instruction that Jackson was guilty of gross negligence when he intentionally fired the shotgun at the police car light bar. Jackson argues that the

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43. In fact Jackson previously argued that Klump's comment in his closing argument that Jackson may have been provoked by Wrede's actions, (RT at 1459, 1475), may have confused or detracted from the defense that whether the response was reasonable or not, Jackson's PCP intoxication might have sparked a rage that was not preceded by deliberation.

shots were not aimed at Wrede, but rather at the flashing light bar on the patrol car, and there was evidence of such intent presented at trial. Jackson argues that due to Klump's failure the trial court only instructed the jury as to involuntary manslaughter under CALJIC 8.47, which required that the jury find Jackson was unconscious at the time of the shooting. CT at 158.

Here the jury found Jackson guilty of first degree murder, and in so doing found that he premeditated and deliberated when shooting Wrede. This verdict was reached despite the various options before the jury to find Jackson guilty of second degree murder, voluntary manslaughter, and involuntary manslaughter under other instructions. CT at 150-63. The jury rejected these other options outright. Even assuming arguendo that there was sufficient evidence to support such an instruction of gross negligence, in light of the jury's verdict, it is pure speculation that the failure to request such an instruction resulted in actual prejudice to Jackson. There is not a reasonable probability that the omission of this instruction "undermine[d] confidence in the outcome" of Jackson's trial. Strickland, 466 U.S. at 694; see also United States v. Murray, 751 F.2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985); United States v. Schaflander, 743 F.2d 714, 717-718 (9th Cir.1984), cert. denied, 470 U.S. 1058, 105 S.Ct. 1772, 84 L.Ed.2d 832 (1985).

4. Klump's Failure to Request Implied Malice Murder Instructions

Jackson contends that Klump failed to request instructions on lesser included offenses that were supported by the evidence. Jackson complains that CALJIC 8.31, defining second degree murder, [44/] and CALJIC 8.11,

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44. CALJIC 8.31 instructs: "Murder of the second

defining implied malice, were necessary to allow the jury to consider his heavily- drugged condition which was obviously at issue during the trial.

Jackson fails to recognize that as the California Supreme Court stated succinctly:

> The jury was instructed on first degree murder--deliberate and premeditated killing with express malice (CALJIC No. 8.20). It was also instructed on second degree unpremeditated murder--an intentional killing without deliberation and premeditation (CALJIC No. 8.30). The court gave the portion of CALJIC No. 8.11 defining express malice--intent to kill--but deleted the portion defining implied malice.

Jackson, 49 Cal.3d at 1199, 264 Cal.Rptr. 852, 783 P.2d 211.

Clearly the jury had various instructions before it, which gave the jury the option of finding Jackson guilty of a lesser crime than first degree murder. The jury rejected all of the lesser offenses, finding that Jackson was guilty of premeditated, deliberate, first degree murder. It is unnecessary to reach the issue of whether Klump's decision not to request an instruction of second degree "implied malice" murder was objectively reasonable, because in light of the jury's finding, the Court finds that Jackson was not prejudiced by the lack of this instruction.

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degree is also the unlawful killing of a human being when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being."

C. Claim 3(N): Counsel Failed to Object to Prosecutorial Misconduct

Jackson complains that Klump failed to object to the portion of the prosecutor's closing argument during the penalty phase, in which he argued that: "A verdict of death will show policemen out there who go to work everyday that their lives are as important as at least the criminal, this defendant's." RT at 1611. Jackson alleges that this improper and inflammatory argument invited the jury to send a signal of support to police officers by returning a verdict of death, and this argument influenced the jury's deliberations.

When examining this portion of the prosecutor's closing argument, the California Supreme Court concluded that:

> At the very least, the argument emphasized what the jurors already knew--that the victim of the murder was a policeman doing his duty--and suggesting that fact should be considered in the decision on penalty. At the very most, the argument brought to the jury's attention the increasing menace of criminal conduct directed against police officers, unsupported in the evidence and irrelevant.

Jackson, 49 Cal.3d at 1206, 264 Cal.Rptr. 852, 783 P.2d 211.

This Court agrees. In a long and complex trial, it is not possible, nor is it usually effective, for an attorney to object to everything which may conceivably be objectionable. United States v.. Molina, 934 F.2d 1440, 1448 (9th Cir.1991) (finding as a matter of strategy, "many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality"). The Ninth Circuit has stated:

> Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to

> object during closing argument and opening statement is within the "wide range" of permissible professional legal conduct.

United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir.1993) (citing Strickland, 466 U.S. at 689).

Even if this portion of the prosecutor's closing argument was improper, which this Court declines to decide, Jackson has not established that Klump's conduct fell outside the "wide range of reasonable professional assistance." See Strickland, 466 U.S. at 687. Moreover, since the Strickland standard dictates the prosecutor's argument must be viewed in conjunction with the "totality of evidence" before the jury, the prosecutorial argument presented "falls short of constitutional prejudice warranting habeas corpus relief." Weygandt v. Ducharme, 774 F.2d 1491, 1493 (9th Cir.1985) (citing Strickland, 466 U.S. at 695).

XVI. Cumulative Effect of Numerous Guilt and Penalty Phase Errors

Because the Court has examined each of the alleged errors of trial counsel [45] and found that none of those alleged errors could have prejudiced Jackson, no cumulative effect with respect to prejudice arises from these alleged errors. See Mak, 970 F.2d at 622; Tucker, 716 F.2d at 595. Nor does the number of contentions unsupported by evidence amount to a cumulative effect of error of constitutional proportion.

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45. While Jackson now includes a claim regarding the performance of appellate counsel under claim 3(O), this claim was not properly included in the Amended Petition, and therefore will not be considered here.

XVII. Claim 1: Jackson Was Incapable of Premeditation and Deliberation

Jackson's claim, that evidence that was never presented to the trial court proves him actually innocent of first degree murder under special circumstances, notwithstanding the verdict reached at this trial, is a substantive claim of actual innocence. Herrera v. Collins, 506 U.S. 390, 400-401, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Jackson contends that "he is actually innocent not because he did not do the act, but because the essential element of deliberation and premeditation for first degree murder did not exist." Pet'r Br. at 78. However, such "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Id. 506 U.S. at 400 (citing Townsend v. Sain, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) ("the existence of merely newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.")). The Herrera Court pointed out "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." Id., 506 U.S. at 416-17.

While the Supreme Court discussed the issue of whether newly discovered evidence of innocence could form the basis for an independent constitutional right to relief on federal habeas, the question was not definitively resolved. Rather the Supreme Court assumed arguendo that in capital federal habeas proceedings, "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, 506 U.S. at 417. The Court went on to find that:

> because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id.

As Justice White suggested in a separate concurring opinion: "petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could find proof of guilt beyond a reasonable doubt." ' Herrera, 506 U.S. at 429 (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (brackets and citation omitted); accord id. at 420-21, 426 (O'Connor, J., concurring); id. at 434-35 (Blackmun, J., dissenting).

This Court will assume for the sake of argument, as the Herrera Court did, that a substantive claim of actual innocence constitutes a cognizable claim on federal habeas. This appears to comport with the Ninth Circuit's finding that this remains an "open question." [46] Carriger v. Stewart, 95 F.3d 755, 757 (9th Cir.1996), reh'g en banc granted, 106 F.3d 1415 (9th Cir. Jan.30, 1997) (No. 95-99025).

Such a substantive claim of actual innocence is subject to the standard of review set forth in Herrera, and not the more lenient standard employed when the claim of actual innocence is a procedural claim, which operates as a "gateway through which a habeas petitioner must pass to

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46. The circuit distinguished its decisions to the contrary on the basis that they were non-capital cases, and that the claim in the one capital case was "based solely on a petitioner's actual innocence of the death penalty." Carriger, 95 F.3d at 757 fn. 1 (citing Clark v. Lewis, 1 F.3d 814, 821 (9th Cir.1993)).

have his otherwise barred constitutional claim considered on the merits." See Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 860-61, 130 L.Ed.2d 808 (1995) (quoting Herrera, 506 U.S. at 404).

Herrera suggests that the petitioner must make "a truly persuasive demonstration of 'actual innocence,' " which is further characterized as a "extraordinarily high" burden of proof. Herrera, 506 U.S. at 417. The Ninth Circuit, recognizing that Herrera did not explicitly define the standard of proof that would be applicable for such claims, filled the gap by concluding that "a petitioner seeking to prove actual innocence under Herrera must do so by clear and convincing proof." Carriger, 95 F.3d at 757. The Ninth Circuit reasoned that:

> we believe the [Supreme] Court would have been more explicit had it meant to require that the petitioner shoulder the same burden as the prosecution at trial, by proving his innocence beyond a reasonable doubt. We therefore hold that a petitioner seeking to prove actual innocence under Herrera must do so by clear and convincing proof.

Carriger, 95 F.3d at 757 (brackets original, citation omitted).

Therefore Jackson bears the burden of proving that he is "unquestionably innocent" by "clear and convincing" evidence. [47] Id., at 757, 761. However, before the Court

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47. The Court is aware that the rehearing en banc in Carriger was conducted on March 27, 1997. However the Court finds that Jackson's claim of actual innocence would fail no matter which burden of proof he was obligated to carry. Since Jackson has not met the more lenient standard by showing through clear and convincing evidence that he is "unquestionably innocent," Carriger, 95 F.3d at 757, 761, he cannot satisfy the arguably more stringent standard set forth in Herrera. Herrera, 506 U.S. at 429.

considers the showing Jackson has made regarding his actual innocence in the evidentiary hearing, there are two procedural arguments that must be addressed first.

A. Whether Relief on a Claim of Actual Innocence Would Be Improper if the State Affords its Prisoners an Avenue for the Presentation of Newly Discovered Evidence in a Capital Case

There is some authority for the argument that freestanding claims of actual innocence should be considered in state clemency proceedings, and not entertained on federal habeas review. Herrera, 506 U.S. at 417 ("the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency"). In fact, the Supreme Court "assume[d], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, 506 U.S. at 417 (emphasis added).

The Ninth Circuit, in Carriger, took note of the Supreme Court's reference to the absence of a "state avenue ... to process such a claim" and observed two competing interpretations of the phrase. Since much of the discussion preceding this comment had related to the availability of executive clemency, the circuit suggested that the Supreme Court may have meant to convey "that a would-be Herrera claimant must exhaust his state remedies--possibly including executive clemency--before a federal court may consider his Herrera claim on the merits." Carriger, 95 F.3d at 758 (citing Herrera, 506 U.S. at 410-18). The Carriger panel also noted, however, that "[a]lternatively, the Court may have meant that federal relief is never available on this ground to a petitioner who has already received, or could

still receive, a state decision on the merits." Carriger, 95 F.3d at 758.

Nonetheless, having noted the two alternatives, the circuit in Carriger bypassed the questions to reject the claim on the merits:

> We leave this question for another day and assume that the former rather than the latter interpretation of Herrera is correct; we also assume that a petitioner need not seek executive clemency to exhaust state remedies for Herrera purposes.

Carriger, 95 F.3d at 758.

Seizing on this unsettled discussion of hypothetical interpretations of the Supreme Court's opinion, Respondent argues that "[f]ederal relief ... would be improper in this case, for California's judicial and executive branches of government both remain open, after the conclusion of a capital criminal case, to consider such evidence." Resp't Br. at 4:17-20. Here California maintains executive clemency as an avenue for actual innocence claims made after the trial judgment has become final. CAL. CONST. art. V, § 8 (West 1996); CAL. PENAL CODE §§ 4800-4801; see also In re Clark, 5 Cal.4th 750, 796-97, 855 P.2d 729, 21 Cal.Rptr.2d 509 (1993) (the California Supreme Court expressly endorsed its willingness to entertain freestanding claims of actual innocence). In fact, the California statute specifically recognizes that a person may receive "a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause ..." CAL. PENAL CODE § 4801.

However, whether or not Jackson has a "state avenue open to process such a claim," Herrera, 506 U.S. at 417, he has failed to " 'unquestionably establish [his] innocence." ' Carriger, 95 F.3d at 761 (quoting Schlup, 115 S.Ct. at 862). Therefore the Court need not reach the unresolved role that the availability of executive clemency would play if Jackson had demonstrated he was entitled to relief on his claim of actual innocence.

B. Whether a Free-Standing Claim of Actual Innocence Can Be Based Upon Factual Innocence or Legal Innocence

The Ninth Circuit appears to accept that a free-standing claim of actual innocence could be entertained on federal habeas, if the evidence can support such a claim. However, what the circuit has yet to address is the distinction between claims of factual innocence, meaning that the defendant was not the individual who committed the crime; and legal innocence, meaning that the defendant did not possess the requisite mental state such that he should be found guilty of the underlying crime. [48]

In Herrera the claim was of factual innocence, that the defendant was not the individual who committed the crime. Herrera, 506 U.S. at 396-97. Similarly, in Schlup, in which the claim of actual innocence was asserted to demonstrate a fundamental miscarriage of justice such that the procedurally barred claims should be reviewed on the merits, the claim was that the defendant did not murder the victim. Schlup, 115 S.Ct. at 857-58. Both defendants in the above cases submitted affidavits which purported to show that other people committed the crimes of which they were found guilty.

The distinction between factual innocence and legal innocence has been noted and relied upon these decisions. Schlup, 115 S.Ct. at 866 ("the quintessential miscarriage of justice is the execution of a person who is entirely innocent"); Herrera, 506 U.S. at 419 (O'Connor, J., concurring) (emphasis added) (assuming there is a distinction between claims solely based upon legal

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48. Respondent characterizes this as a "mental-state innocence" claim, which only offers a "new 'spin' on the subjective and inherently problematic opinion evidence" already presented and rejected at Jackson's trial. Resp't Br. at 5 & n.2.

innocence, and claims of factual innocence: "the execution of a legally and factually innocent person would be a constitutionally intolerable event."); see also Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (plurality opinion) (the fundamental miscarriage of justice exception is available "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"). But see Schlup, 115 S.Ct. at 864 (recognizing defendant's interest in relief " 'if he is innocent of the charge for which he was incarcerated" ') (quoting Kuhlmann, 477 U.S. at 452).

Similarly, the Ninth Circuit decisions on the issue of whether a free-standing claim of actual innocence is cognizable on federal habeas also involve claims of factual innocence. Carriger, 95 F.3d at 758-59 (petitioner claimed that another individual had admitted to committing the murder); Coley v. Gonzales, 55 F.3d 1385, 1387 (9th Cir.1995) (the petitioner was claiming that he was factually innocent); Swan v. Peterson, 6 F.3d 1373, 1384-85 (9th Cir.1993) (the petitioner wanted to introduce evidence that the rape of which he was convicted did not actually occur), cert. denied, 513 U.S. 985, 115 S.Ct. 479, 130 L.Ed.2d 393 (1994); see also Brecheen v. Reynolds, 41 F.3d 1343, 1357 (10th Cir.1994) (citing Steele v. Young, 11 F.3d 1518, 1522 n. 8 (10th Cir.1993)) (explicitly addressing the distinction between factual innocence and legal innocence [when determining whether a claim of innocence qualifies as a fundamental miscarriage of justice], and finding that the "appropriate inquiry, concerns actual or factual innocence, as compared to legal innocence"), cert. denied, 115 S.Ct. 2564 (1995).

It is true that in Clark the claim was not one of factual innocence, but rather that the petitioner was actually innocent of the death penalty. Clark, 1 F.3d at 821. However that claim was not raised as a free-standing claim of actual innocence, but instead as support for the fundamental miscarriage of justice exception to allow the

petitioner's procedurally barred claims to be reviewed on the merits. Id. at 820. This makes the case distinguishable.

Similarly distinguishable is Jones v. Delo, 56 F.3d 878 (8th Cir.1995), cert. denied, Jones v. Bowersox, 517 U.S. 1109, 116 S.Ct. 1330, 134 L.Ed.2d 481 (1996), which Jackson relies upon to a large extent to justify this claim for relief. In Jones, while the petitioner was arguing he was "incapable of satisfying an essential element of the crime for which he was convicted," his claim was not a freestanding claim of actual innocence. Id. at 883. Rather the petitioner was attempting to "invoke the actual innocence exception to the procedural default as a gateway to considering the merits of his constitutional claims." Id. at 882. Thus he only had to satisfy the standard set forth in Schlup, which is whether " 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." ' Id. (quoting Schlup, 115 S.Ct. at 867). Here Jackson, who is asserting a freestanding claim of actual innocence, is not entitled to utilize this more relaxed burden of proof.

The claim in the instant case is distinguishable from the authority relied upon by Jackson, as he is not claiming that he is factually innocent of the murder, but rather that he was incapable of forming the requisite criminal intent for the commission of capital murder. The Court finds that this affords yet another basis for denying relief on Jackson's claim of actual innocence. [49]

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49. Since Jackson cannot meet the necessary standard for relief on his claim of actual innocence of first degree murder or the special circumstances, it is unnecessary to determine whether his newly discovered evidence would be sufficient to demonstrate innocence of the state-law elements of a crime or whether there is a higher standard imposed for determining when capital punishment becomes constitutionally intolerable. See Resp't Br. at 5:17-6:8. This Court declines to reach that issue.

C. Jackson's Showing of Actual Innocence

Assuming arguendo that one can be actually innocent by demonstrating that one cannot satisfy the essential elements of the crime for which he was convicted, Jackson has not shown by clear and convincing proof that he was incapable of premeditating and deliberating at the time he shot and killed Wrede. Under state law the required mental state necessary to support Jackson's conviction of first degree murder is that he must have been able to "weigh and consider the question of killing and the reasons for and against such a choice, and having in mind the consequence, he decides to and does kill." CALJIC 8:20.

With the "extraordinarily high" burden of proof placed upon Jackson in mind, Herrera, 506 U.S. at 417, the Court focuses first on the events surrounding the murder of Wrede, and second on the nature of the newly discovered evidence.

The Court is cognizant of the fact that the jury heard evidence regarding the strange behavior exhibited by Jackson minutes before he encountered Wrede. Testimony to the effect that Jackson was "just yelling anything," was "diving" into the sidewalk, and jumping, was presented. RT 919-921. Additional testimony at trial indicated Jackson, who was seen at an intersection in the street, appeared disoriented and unsure as to what direction he wanted to go. He was observed pulling and slapping at his hair, and appeared to be under the influence of some kind of intoxicant. Indeed Wrede radioed that he would be out with a "possibly dusted" suspect, and requested the assistance of additional officers. EH Exhibit 57 at 93. This evidence was clearly presented during trial because Jackson's primary defense at trial was that he was under the influence of PCP at the time of the shooting. While the Court agrees that Jackson's behavior prior to encountering Wrede was strange and bizarre, even when considered in conjunction with the new scientific evidence presented by Jackson, there is not any evidence of actual innocence.

1. The PCP Level

The Court will proceed on the assumption that the level of PCP in Jackson's blood was 176 ng/ml See EHT, vol. 3 at 40-41. While the experts agree that this is a high level, the experts disagree on whether that amount would grossly impair any person. The California Supreme Court summarized the testimony at trial regarding Jackson's PCP blood level as follows:

> Dr. Orm Aniline, a psychiatrist, testified that the effects of PCP are unpredictable and vary with the individual. A chronic user, because of PCP stored in his system, may be "set off" with a slight amount of PCP as compared to a first-time user. Although a first-time user would be unconscious with about 100 nanograms per milliliter of PCP in the blood, there is no way to determine what amount of nanograms per milliliter of PCP in the blood would render a chronic user unconscious. There is no agreed upon intoxication level of PCP which indicates when a person is under the influence of PCP or which will predictably result in distorted behavior. Some PCP intoxicated persons behave normally, while some users may "overreact" and engage in "bizarre behavior" in what are perceived as stressful events or acts of provocation, such as an order from a police officer. A person intoxicated with PCP may believe he has an unusual amount of strength and might believe he could pull a tree out of the ground. One of the effects of PCP is to produce anesthesia and reduce feelings of pain.
>
> Dr. Aniline opined that defendant was under the influence of PCP at the time of the shooting of Wrede. However, he could not say whether, in fact, defendant deliberated, premeditated, or had the specific intent to kill or committed the fatal act with malice aforethought because of the

> uncertainty of the effects of PCP on an individual. He concluded that some of defendant's ability to think may have been impaired by his PCP usage.
>
> In reaching his opinions, Dr. Aniline had not interviewed or examined defendant nor had he studied his background or medical history.

Jackson, 49 Cal.3d at 1184, 264 Cal.Rptr. 852, 783 P.2d 211. It is interesting to note that Dr. Aniline did not testify that the PCP in Jackson's system would make him amnestic, the claim he made at the evidentiary hearing. EHT, vol. 1, at 199, 226; EHT, vol. 2, at 11.

At the evidentiary hearing the experts agreed with the opinion provided at Jackson's trial that "[t]here is no agreed upon intoxication level of PCP which indicates when a person is under the influence of PCP or which will predictably result in distorted behavior." Id. Dr. James Missett, board-certified in neurology and forensic psychiatry (Missett Narr. at ¶ 15), provided his opinion that due to the variability of the effects of PCP on different people, it could not now be determined to a reasonable medical certainty whether Jackson's level of PCP intoxication at the time of the crime rendered him incapable of premeditation and deliberation. (Missett Narr. at ¶¶ 49-50, 70). Dr. Randall Baselt, a toxicologist, opined that "[i]t cannot reasonably be concluded that no one with a PCP blood level of 176 ngs./ml. can process thought, premeditate and deliberate, or intend to kill. Scientific literature reflects instances where persons with levels over 150 ngs./ml. showed only minor effects from PCP." (Baselt Narr. at ¶ 16). His opinion was supported by several examples from the scientific literature.[50] (Baselt Narr. at ¶ 16).

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50. The Court understands that the cognition of the subjects in the studies discussed in the scientific literature was tested through a clinical evaluation, which included orientation questions and neurological tests. EHT, vol. 4B, at 68-73.

Dr. Baselt testified that:

> An individual's prior experience with PCP--including the frequency of use over time and levels of dosage--well may make him more tolerant of the drug so as to enable him to undertake those thought processes. A regular and long- time user of PCP will develop resistance to the effects of the drug such that individual still may be able to conduct certain mental and motor functions to a much better degree than someone who did not have the resistance.

Baselt Narr. at ¶ 17.

Dr. Aniline, who served as Jackson's expert at both his state court trial and again during his evidentiary hearing conducted by this Court, testified that "the tolerance that is demonstrated in the literature generally refers to motoric tolerance not to cognitive tolerance," and motoric tolerance allows a person to "conduct most passive processes or known, learned or familiar processes without seeming impairment." EHT, vol. 2, at 18. However he also admitted that Jackson was a "chronic user" of PCP, and that "he had tolerance to some of the effects of the PCP," EHT, vol. 3, at 39, which allowed Jackson to maintain motor skills and other learned skills. EHT, vol. 3, at 40. Later he stated "I have conceded that Mr. Jackson is tolerant by the fact that he was noncomatose, nonambulatory with this blood level." EHT, vol. 3, at 130.

Dr. Aniline testified that by definition, someone is intoxicated when an intoxicant is present in their system. EHT vol. 3, at 51. However, depending upon the level of intoxication, a person could still think clearly. EHT vol 3, at 52. Thus the issue becomes to what extent Jackson retained only motor skills, and to what extent he maintained his cognitive functions.

Dr. Aniline conceded that part of the data he relied upon, which is found in the scientific literature, specifically stated that "PCP levels of 100 nanograms per milliliter are almost invariably associated with gross impairment of

consciousness," EHT, vol. 3 at 59-60 (discussing data based upon the 1991 Javitt and Zukin article "Recent Advances in the Phencyclidine Model of Schizophrenia"). Dr. Aniline admitted that "almost invariably" means not in every case. EHT, vol. 2, at 21. In addition, the primary study that Dr. Aniline relied upon, which purported to analyze the similarities of PET scans of chronic PCP users and schizophrenic patients, was not subjected to peer review. EHT, vol. 5, at 6.

Through pointed questions the Court ascertained that Dr. Aniline revised his opinion based upon extrapolation from animal studies. EHT vol, 6 at 6-7, 10- 12. Dr. Aniline testified that the part of the work "tying the PCP receptor specifically to the NMDA receptor and to specifically memory functions is based on live animal work." EHT, vol. 5, at 10-11. It was this work that he relied upon in changing his opinion as to the level of reasonable medical certainty that Jackson could not premeditate or deliberate. EHT, vol. 5, at 10. It is clear that no tests in the scientific community have been conducted in which the effects of PCP on the NMDA receptors in human beings has been determined. EHT, vol. 5, at 12. The Court also learned that the fact that Jackson had a known tolerance to the effects of PCP and the fact that the tolerance levels of chronic PCP users were unknown in the study Dr. Aniline was relying upon in part for his opinion, would "pose[ ] some problems" in applying the results of Dr. Wu's study to Jackson. EHT, vol. 5, at 13-14; see Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Dr. Aniline opined that "behavior in and of itself doesn't tell [one] whether he [the person under the influence of PCP] has a functional memory in work at the time of that behavior." EHT, vol. 5, at 19. When confronted with a hypothetical generally detailing the different witness accounts of Jackson's actions during his confrontation with

Wrede, [51] Dr. Aniline testified that if the individual was intoxicated with PCP, those actions would be motoric, although the odds are one out of ten that the acts could be the product of a cognitive process. EHT, vol. 5, at 28. Although it would counter his own experience, Dr. Aniline believes it is "certainly possible" and "conceivable" that Jackson could have been the one person out of ten that could have performed all the acts in the hypothetical as cognitive acts. EHT, vol. 5, at 28. Nevertheless, Dr. Aniline believes it would be "an extremely rare occurrence." EHT, vol. 5, at 28. Dr. Aniline further conceded that if a jury had all the information that he had presented at the evidentiary hearing about PCP, the jury could still come to

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51. The hypothetical was set forth as follows:

> Let's assume that there is a person that is not under the influence of PCP and further assume that that person did the following acts:
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> One, swan dived in the road. When asked where he was going he just pointed in a direction and then followed that direction; had a confrontation with an officer and did not sit on the curb when asked by the officer. He saw a police officer go to the driver's side of the car and he then went to the passenger side of the car. He struggled with the officer in the car and wrestled the shotgun from him. He got out of the car, cocked the weapon, unlatched the safety, and pointed it at the officer and during this standoff says to the officer "I'll kill you." And when the officer stops pointing his gun at him and puts his arms up in the air, the person shoots the officer.
>
> Then what happens is additional police officers arrive on the scene and he says, "I'll kill all you fucking pigs."

EHT, vol. 5, at 25-26.

the conclusion that those acts set forth in the hypothetical, which generally mirrored the actions of Jackson during his confrontation with Wrede, were cognitive acts. EHT, vol. 5, at 28. When pressed by the Court, Dr. Aniline opined that the only way that he knew that Jackson was not processing information cognitively when he encountered Wrede was by inferences, not by reasonable medical certainty. EHT, vol. 5, at 28-29. The opposite inferences regarding cognitive ability could just as easily be drawn. This is hardly clear and convincing evidence.

Dr. Aniline agreed that one could infer Jackson recognized the value of using a wooden stake as a weapon from his actions during the incident. EHT, vol. 1, at 208. Such action would show that Jackson was engaged in serial thought. EHT, vol. 1, at 208. Similarly, it would be a rational inference to find that Jackson premeditated if it was true that he went to the police car to get the gun. EHT, vol. 1, at 210-11. In addition, Jackson's actions with the gun strongly suggested that he intended to kill Wrede with it. EHT, vol. 1, at 215. The fact that Jackson did not shoot Wrede until he put his hands up would support a finding that Jackson calculated his actions and that he premeditated. EHT, vol. 1 at 216.

Moreover, the fact that Jackson, who told his psychiatrist at trial that he had never fired a shotgun before, managed to take sequential steps to fire the shotgun would demonstrate that he knew what he was doing. EHT, vol. 1, at 219. Likewise, Jackson announcing his intention to use a gun would demonstrate his intent to kill. EHT, vol. 1, at 220. Dr. Aniline testified that announcing one's intention to do some future act, "generally reflect[s] some association between what's happening now that's stored information." EHT, vol. 5 at 23. Thus there is "some thinking" involved in stating a future act, although Dr. Aniline opined that it does not necessarily demonstrate an intact cognitive system. EHT, vol. 5, at 23-24. However Jackson's verbal responses could indicate that he knew he had killed, that he was aware he was dealing with policemen, and that he understood the

gun could not only shoot but could kill. EHT, vol. 1, at 221-23. Finally, Jackson's attempts to grab one of the police officer's gun from his holster while he was being arrested could be logically viewed as showing planning, as well as Jackson's intent to kill.

Thus Dr. Aniline conceded that the reported conduct that Jackson engaged in at the time of the shooting involved something more than just a reflective-type motoric response. [52] EHT, vol. 2, at 20. Dr. Aniline also agreed that there is a waxing and waning effect with PCP, so that someone on PCP may be incapacitated grossly in one moment, and then a minute later, have a higher level of consciousness. EHT, vol. 2 at 33.

Even if the Court accepts that the behavior of Jackson at the time he shot Wrede cannot be interpreted to refute Jackson's contention that he was "cerebrally anesthetized," the other evidence that Dr. Aniline relied upon, which was Jackson's own testimony that he does not remember anything about the shooting, was (1) self-serving; and (2) contradicted by the state court record. [53] Jackson contends

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52. Dr. Aniline defined a reflexive action as one that does not "require current new memory," or as a "pattern of behavior" that can be elicited "without thinking about new information." EHT, vol. 5, at 21. In other words, you can "react from a stimulus that's in front of you but you draw your behavior from old information." EHT, vol. 5, at 21. However, the stimulus to the reflexive action must be recognized. EHT, vol. 5, at 22-23.

53. Jackson testified that the last thing he remembered was passing around the third "super cool" with his friends. The next thing he remembers he was somewhere "with a lot of lights in my face and I thought I heard somebody say that I was--I was a hero." RT 1224:16-1227:4. Officer Lee testified that Jackson, when told that he was arrested for murder, asked "I killed a policeman?" Lee testified that "At that time we advised

that it is possible that he obtained information about the crime from other sources, such as the paramedics who transported him to QVH and the medical personnel who came into contact with him. Yet Jackson never demonstrated that he had no independent recollection of the shooting. Dr. Aniline admits that Dr. Mead, had a difficulty understanding how Jackson seemed to have some memory but not all memory. EHT, vol. 4B at 57; see also Aniline Dep. at 24, 26-29. Specifically Dr. Aniline said that Dr. Mead was confounded by Mr. Jackson's "memory kind of turning on and off," and Dr. Aniline opined that he did not believe that Dr. Mead accepted that Jackson could have memory of some events and not of others. EHT, vol. 4B at 57; see also Aniline Dep. at 27-29. Dr. Aniline himself admitted that if Jackson had memory of shooting Wrede with the gun, then he would not be able to say that Jackson was amnestic. [54] This would upset the foundation of Dr. Aniline's theory, which is that Jackson did not go through all four levels of cognitive function during the shooting of

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him he was under arrest for murder and that no one had mentioned anything about a policeman." RT at 877. When Jackson was interviewed the next day, he was asked if he remembered who the officers were. Jackson responded "Yeah, you are the two policeman that said I killed that cop with a shotgun." RT at 879-80. Lee testified that "At that time we pointed out to him that we had not made a mention of a shotgun. He stated that he must have read it in the newspaper. We then asked how he could have read a newspaper with his hands restrained down to the side of the hospital bed and his eyes almost swollen shut. He replied he was unsure where he had gotten the information about the shotgun." RT at 880.

54. Dr. Aniline did testify that "amnestic" was simply a term indicating one was in a state of amnesia. He also agreed that amnesia is the inability to recall events that had just transpired. EHT, vol. 4B at 65.

Wrede. Since Dr. Aniline's opinion relies upon a disputed fact, i.e. whether Jackson had independent memory of the shooting, Jackson has failed to make a truly persuasive demonstration that he was cerebrally anesthetized such that he had no functional memory at the time of the shooting. Accordingly, Jackson's claim that he was incapable of forming the requisite criminal intent for the commission of capital murder fails. Dr. Aniline's testimony left the Court with the uneasy feeling that it was listening to a "hired gun."

2. Positron Emission Tomography ("PET Scan")

Jackson requested and was granted the funds to have a PET scan, and presented the results of the PET scan at the evidentiary hearing. The PET scan must be examined both in conjunction with the evidence of Jackson's level of PCP intoxication, and separately, as Dr. Aniline testified that while the PET scan results strengthen and confirm his opinion, he did not rely upon it in a critical sense. Rather the PET scan results only accounted for a couple of percentage points of his opinion that Jackson "was in a PCP-induced amnestic and anesthetized cerebral condition which, to a 95% medical certainty, rendered him physiologically incapable of premeditating, deliberating, or forming an intent to kill Officer Wrede." Aniline Narr. at ¶ 76.

Jackson's expert, Dr. Wu, an Associate Professor of Psychiatry at University of California, Irvine, School of Medicine, and the Acting Director of the U.C. Irvine Brain Imaging Center, admitted that taking a PET scan of the brain for the clinical purpose of diagnosing chronic PCP use has not been generally accepted in the scientific community as an appropriate use of PET scans. EHT, vol. 1, at 76-77. He further admitted that any measurement relating the effects of PCP use directly to thought process with a PET scan has been primarily "indirect and inferential." EHT, vol. 1, at 80. When asked if it was generally accepted in the scientific community to take a PET scan twelve years after a homicide to assist in determining whether the killer

was physiologically incapable of either premeditating or intending to kill or recognizing the peace officer status of his victim, Dr. Wu testified that he thought it would be a "controversial" issue, and there would not be a "clear consensus" among the scientific community. EHT, vol. 1, at 87-88.

Dr. Wu conceded that there has only been one published study in the area of PET scans and PCP abusers, which is his own 1991 study, although the study did not indicate anything about the cognition level of the PCP abusers. EHT, vol. 1, at 81. This study purported to find that PET scans of PCP addicts demonstrated a consistent hypofrontality similar to that found in schizophrenics. Wu Narr. at ¶ 5. According to Dr. Wu, hypofrontality is a condition in which the frontal lobe of the brain shows a decrease in activity relative to the posterior portion of the brain which either remains the same or increases. Wu Narr. at ¶ 4. On the other hand, Respondent's expert, Dr. Mayberg [55] believed the term meant looking at the frontal

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55. Dr. Helen Mayberg is a clinical neurologist; an associate professor of neurology, psychiatry, and radiology at the University of Texas Health Science Center at San Antonio; and a senior scientist at the University's Research Imaging Center. She has spent a great majority of her time at the Research Imaging Center doing research with PET scanning. She has written extensively on the clinical application of brain imaging technology, including positron-emission tomography (PET) and single-photon emission tomography (SPECT), and has published approximately twenty-five peer-reviewed articles and approximately fifty "abstracts" specifically focusing on PET. She is a reviewer for a number of peer-reviewed journals, including the *Journal of Nuclear Medicine, Cerebral Blood Flow & Metabolism, Annals of Neurology, Journal of Neuropsychiatry, and the American Journal of Psychiatry, and Neurology*. Mayberg Narr. at ¶¶ 2, 4, 7.

lobe activity in isolation. EHT, vol. 2, at 154-55. Nevertheless, the only study which states that frontal to occipital ratio is a critical finding to determine PCP abuse is Dr. Wu's own 1991 study. EHT, vol. 1, at 121.

Dr. Wu himself characterized his findings in that study as "preliminary," due to the fact that the study involved only seven patients. EHT, vol. 1 at 65. Despite his own characterization of the findings as preliminary, Dr. Wu relied upon his own report as the sole published report for his opinion in Jackson's case. EHT, vol. 1 at 65. Moreover, his own report was not a peer-reviewed study. EHT, vol. 1, at 62-65. In addition, the study participants had abstained from using PCP for various intervals of time, ranging from three days to two weeks, whereas Jackson had presumably abstained for the twelve years during which he has been imprisoned. Daubert, 509 U .S. at 592-94. Dr. Mayberg criticized this aspect of Dr. Wu's study, since he did not control for how long the study participants had been using PCP, or when they last used PCP. EHT, vol. 2, at 198. In addition, the study included no information about the state of the study participants, the clinical findings in those patients, or anything about their behavior. EHT, vol. 2, at 199.

Another problem with Dr. Wu's conclusions is his utilization of one standard deviation as an indication of abnormality. For Jackson's brain scan, Dr. Wu testified that "we have only chosen to show those regions which are either one standard deviation above or one standard deviation below the normal," although the color bar demonstrates from one to three standard deviations. EHT, vol. 1, at 168-69. Dr. Wu admitted that he relied primarily upon a visual examination of the original statistical parametric map. EHT, vol. 1, at 109. Yet on cross-examination, Dr. Wu acknowledged that when using two standard deviations as his measure of abnormality when relying upon the numeric data, none of the areas of the brain scan would be indicate abnormalities that would exceed two standard deviations. EHT, vol. 1, at 110.

Dr. Mayberg agreed with Dr. Wu with respect to characterizing his findings as preliminary, as she testified that PET is only recognized as a clinical instrument for the diagnosis and treatment of three specific conditions: brain tumors, dementia (including Alzheimer's disease), and epilepsy. EHT, vol. 2, at 109. Dr. Mayberg based her opinion on the position of the Academy of Neurology, which has a position paper defining the clinically recognized uses for PET scans. EHT, vol. 2 at 113.

Dr. Mayberg also believes that there is no way to draw information about whether Jackson had an impaired level of cognition from a PET scan done at any time, because a PET scan reflects someone's behavior when they are having the scan. In other words, it is a "real time picture" of brain function. EHT, vol. 2, at 200. After reviewing Jackson's PET scan, Dr. Mayberg concluded that it was normal, as she compared the numeric data, using the two standard deviation measurement. Dr. Wu admitted that Jackson's case was one of the first cases in which he had attempted to utilize the quantitative method of assessing the differences in an individual PET scan. EHT, vol. 1, at 33. Later Dr. Wu testified that this method had been used four or five times before, and that it was used in response to Dr. Mayberg's suggestion that more data on the subject would be useful. EHT, vol. 1, at 106. Prior to relying upon the numeric data, Dr. Wu relied upon a visual examination in which he looked at the "relationship of which areas of Jackson's brain showed areas that were one standard deviation or higher than normal." EHT, vol. 1, at 55. Dr. Wu appeared to believe that the one standard deviation measurement was sufficient, although when asked, he opined that even under a two standard deviation measurement, Jackson's brain scan was abnormal. EHT, vol. 1, at 55. Clearly the experts disagree on how the PET scan should be interpreted. Again the Court had the uneasy feeling that Dr. Wu's testimony was so flawed that it was listening to a hired gun anxious to make the PET scan the instrument of truth.

Based upon an examination of all the evidence, the Court finds that whether or not the PET scan could be interpreted to demonstrate hypofrontality, a point upon which the experts disagree, is not particularly important. Rather the Court points out that the study used to correlate the alleged hypofrontality in Jackson's PET scan to that condition found in schizophrenic patients was not the subject of a peer-reviewed article, and only constituted a preliminary finding. Such a preliminary finding, and the novel use of PET scans in this area are simply not the type of evidence that the Court deems suitable to make a "truly persuasive demonstration of actual innocence," nor is it clear and convincing evidence of Jackson's innocence. Herrera, 506 U.S. at 417; Carriger, 95 F.3d at 757, 761; see also Daubert, 509 U.S. at 592-94. Accordingly, Jackson is not entitled to relief on this claim.

XVIII. Eighth Amendment Violations

A. Claim 4(A): The Peace Officer Special Circumstance Provision of the California Death Penalty Statute Violated the Eighth Amendment

Jackson contends that the peace officer special circumstance provision set forth in § 190.2(a)(7) of the California Penal Code [56] violated his due process rights because it failed to focus on the moral culpability of the individual offender and his particular offense. He argues that the "reasonably should have known" mental state provision of that special circumstance provision is an

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56. That special circumstance provides: "The victim was a peace officer ... who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties ..." CAL. PENAL CODE § 190.2(a)(7).

unconstitutional basis for deciding eligibility for the death penalty because it invokes an objective test traditionally used to determine the existence of simple negligence, and proof of mere negligence does not provide a principled basis for distinguishing this offense from intentional crimes that do not give rise to special circumstance liability. He also contends that it is unconstitutionally vague and over broad and violated his right to a reliable sentence under the Eighth Amendment.

What Jackson fails to acknowledge is that the jury found, both, that he knew and that he reasonably should have known that his victim was a peace officer. [57] Because the jury found both that Jackson knew and reasonably should have known that Wrede was a peace officer, Jackson's reliance on only one portion of the jury's finding fails to state a cognizable claim. [58]

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57. The jury came back with a verdict that stated:

> We further find the allegation that the victim was a peace officer who was intentionally killed while engaged in the performance of his duties and that the defendant knew and reasonably should have known that the victim was a peace officer engaged in the performance of his duties within the meaning of Penal Code section 190.2(a)(7) to be true.

RT at 1512 (emphasis added); see also CT at 194, 199.

58. The jury came to its conclusion after having received a jury instruction which provided that in order to find the special circumstance the fact "that the defendant knew or reasonably should have known that the person killed was a peace officer engaged in the performance of his duties" must be proved. CT at 165 (giving of CALJIC 8.81.7 as modified).

Even if the jury had not specifically found that Jackson knew Wrede was a peace officer, his claim would fail on the merits. First, the Supreme Court has found that "the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." Roberts v. Louisiana, 431 U.S. 633, 636, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977). Jackson relies upon Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), for the proposition that the state's statutory framework for the imposition of the death penalty must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Nevertheless, when discussing the desirability of limiting the death penalty to particular crimes, the Stephens court itself acknowledged its own holding that the murder of a peace officer may be considered as an aggravating circumstance due to the " 'special interest in affording protection to those public servants who regularly must risk their lives ..." ' Stephens, 462 U.S. at 877 n. 15 (quoting Roberts, 431 U.S. at 636).

Second, and even more importantly, the Supreme Court has examined and upheld the general facial validity of California's 1977 statutory scheme governing the death penalty, which included the peace-officer special circumstance that is at issue in this case. Pulley v. Harris, 465 U.S. 37, 53, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); see also California v. Brown, 479 U.S. 538, 540, 107 S.Ct. 837, 93 L.Ed.2d 934 n. *(1987). The Court notes that the provision herein at issue, was substantially identical to the provision set forth in the 1977 statute. In fact the only difference between the provision under which Jackson was sentenced and the provision examined in Harris was the number of sections referenced for the definition of a peace officer. [59]

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59. The provision under which Jackson was sentenced

B. Claim 4(B)(1): The Death Penalty Jury Instructions Created an Impermissible Conclusive Presumption

Jackson contends that the penalty phase jury instructions were constitutionally defective because they created an impermissible conclusive presumption as to appropriateness of death and prevented the jury from ever addressing the state's actual capital sentencing standard. Jackson specifically objects to CALJIC 8.84.2, which instructed the jury that: "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." CT at 229; RT at 1653:4-7. Jackson argues that this instruction was reinforced by the prosecutor's references to the weighing process involved in the jury's decision-making process. Jackson asserts that under California law, no one is to be executed unless the jury ultimately decides death is appropriate, regardless of whether the aggravating circumstances are weightier than the mitigating circumstances.

The Court concludes that Boyde v. California, 494 U.S. 370, 372-78, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and Blystone v. Pennsylvania, 494 U.S. 299, 305-07, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) definitively dispose of this claim. In Boyde the Supreme Court addressed a claim based upon the same instruction at issue here. [60] Boyde

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referenced additional sections for the definition of a peace officer which increased the numbers and types of peace officers covered by the statute. Compare former 190.2 subd. (c)(1); Stats.1977 c. 316, § 9, p. 1257-58, repealed by § 5 of Initiative Measure approved Nov. 7, 1978 with former 190.2 subd. (a)(7) as added by § 6 of Initiative Measure approved Nov. 7, 1978.

60. In Boyde the jury was given CALJIC 8.84.2 and told that: "if you conclude that the aggravating

complained that the "mandatory nature of former CALJIC 8.84.2 resulted in a sentencing proceeding that violated the Eighth Amendment because the instruction prevented the jury from making an 'individualized assessment of the appropriateness of the death penalty." ' Boyde, 494 U.S. at 376 (citing Penry v. Lynaugh, 492 U.S. 302, 318-20, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). He further contended that because of that instruction "the jury was prevented from deciding whether, in light of all of the aggravating and mitigating evidence, death was the appropriate penalty." Id. Relying upon its prior decision in Blystone, in which it had rejected a challenge to an instruction with similar mandatory language, the Supreme Court denied relief on the claim, finding that: " '[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." ' Id. at 377 (quoting Blystone, 494 U.S. at 307). The Boyde court rejected the petitioner's argument "that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances," and held that "there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty." ' Id. (quoting Franklin v. Lynaugh, 487 U.S. 164, 181, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion)). Accordingly the Supreme Court determined that

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circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." Boyde, 494 U.S. at 374 (emphasis in original). This is the same instruction that was given to Jackson's jury. CT at 229.

the petitioner's "claim that the 'shall impose language of CALJIC 8.84.2 unconstitutionally prevents 'individualized assessment' by the jury is thus without merit." Id.; see also Walton v. Arizona, 497 U.S. 639, 650-51, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (finding that so long as the state statute does not prevent the sentencer from considering any factors in mitigation, it comports with the requirement of individualized sentencing); Blystone, 494 U.S. at 305 (finding that an instruction similar to CALJIC 8.84.2 was not impermissibly mandatory because "death is not automatically imposed upon conviction for certain types of murder. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances.").

Jackson also contends that the prosecutor's arguments served to mislead the jury regarding their obligation to determine whether death was the appropriate punishment. An identical claim was raise in Bonin v. Vasquez, 794 F.Supp. 957 (C.D.Cal.1992), aff'd 59 F.3d 815 (9th Cir.1995), cert. denied, 516 U.S. 1051, 116 S.Ct. 718, 133 L.Ed.2d 671 (1996), in which the petitioner not only claimed that the "instruction took the sentencing discretion out of the jury's hand," but also argued "that the mechanical counting interpretation of the instruction was reinforced by the prosecutor's closing argument at the penalty phase." Id. at 983. Therein the court found the claim was meritless as the jury was adequately informed that there was a "discretionary element to the deliberations." Id. at 984.

Here the prosecutor instructed the jury to "measure all of these things [factors in mitigation and aggravation] that you've heard including the crime itself." RT at 1616:21-22. He argued "[f]inally, I suggest to you, when you add up all of those, that the factors in aggravation are far, far in quality and in quantity outweigh any factor in mitigation." RT at 1622:2-5. Jackson's attorney pointed out several times that the jurors should give whatever weight they wanted to any

aggravating factors that they found to have been proven beyond a reasonable doubt, as well as to mitigating factors. RT at 1631:13-14; 1646:4-16; 1647:1-15. The jury was specifically instructed by the trial court that mitigating or aggravating factors were to be evaluated to determine the appropriate punishment. [61] The jury instructions,

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61. The jury was specifically instructed:

> As to those factors that you find to be mitigating, they are only examples of some of the factors that you may consider in determining the punishment in this case.
>
> You should pay careful attention to them and give them the weight to which you find them to be entitled.
>
> You are not required to limit your consideration of mitigating circumstances to these factors. You may also consider other circumstances relating to the case, or to the defendant, as reasons for not imposing the death sentence. Any mitigating circumstance, standing alone, may be sufficient to support a decision that life without possibility of parole is the appropriate punishment, providing the mitigating circumstance or circumstances outweigh the--any aggravating circumstance or circumstances.
>
> Any aggravating circumstance standing alone may be sufficient to support a decision that death is the appropriate punishment, provided that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances.
>
> In this part of the trial the law does not forbid you from being influenced by sympathy or pity for the defendant. However, the law does forbid you from being governed by conjecture, prejudice, passion or public opinion.

considered in conjunction with the arguments of the prosecutor and Jackson's trial attorney, made it clear to the jury that they were to give whatever weight they chose to the aggravating and mitigating factors, and that the process was not simply a mechanical weighing process.

The jury instructions given during the penalty phase are also the key to evaluating Jackson's claim that he had a liberty interest in having the state follow its own statutory requirements, specifically that the jury find that death is "the appropriate penalty under all the circumstances." Am. Pet. at 60:5-20. This Court assumes for the sake of argument that Jackson indeed possessed a liberty interest in having the state trial court follow its "statutorily mandated procedures to him in the same manner as other defendants." See Siripongs, 35 F.3d at 1322-23. Although the right to have the jury decline to impose a death penalty because it would not be "appropriate" is solely a state created right, it is a significant part of the process by which California administers its death penalty.

Nevertheless, the jury instructions identified above, examined in their entirety, did not command the jury to undertake an inappropriate mechanical weighing process, or discourage or preclude the jury's exercise of the discretion it possessed under California law. Accordingly, the Court finds Jackson is not entitled to relief on this claim.

C. Claim 4(B)(2): The Death Penalty Jury Instructions Provided Unconstitutionally Vague Factors in Aggravation

Jackson contends that the sentencing factors set forth in section 190.3 of the California Penal Code were vague because Jackson's jury was not instructed as to which factors were aggravating and which were mitigating, which resulted in the jury not being informed that certain factors were only

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RT at 1595: 10-96:19.

to be considered in mitigation. Jackson also argues that the jury could have been mislead and have determined that the absence of a mitigating factor acted as an aggravating factor. Jackson believes that the failure to properly apply the aggravating and mitigating factors operated to deny his constitutional right to due process. He further contends that he could have been sentenced to death due to the erroneous instructions rather than because of his criminal conduct, which violates the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty. In the Supplemental Briefing Jackson also contends that he had a liberty interest in having the state follow its established procedures. [62] Pet'r Supp. Brf. at 9.

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62. The Court finds that it is not obligated to address Jackson's argument that because under California law specific factors are only to be considered as mitigating factors, that the failure to identify them as such deprived him of a liberty interest without due process. This claim was not raised in the petition, but only in the supplemental briefing so it is not properly before the Court. See Cacoperdo, 37 F.3d at 507. Nevertheless, even if this claim were properly before the Court, state law does not mandate that the jury instructions on the sentencing factors identify which factors are mitigating. People v. Davenport, 11 Cal.4th 1171, 1229, 906 P.2d 1068, 47 Cal.Rptr.2d 800 (1995), cert. denied 519 U.S. 951, 117 S.Ct. 364, 136 L.Ed.2d 255 (1996); People v. Howard, 1 Cal.4th 1132, 1196, 824 P.2d 1315, 5 Cal.Rptr.2d 268 (1992), cert. denied, 506 U.S. 942, 113 S.Ct. 383, 121 L.Ed.2d 293 (1992); People v. Pinholster, 1 Cal.4th 865, 973, 824 P.2d 571, 4 Cal.Rptr.2d 765 (1992), cert. denied, 513 U.S. 822 (1994). Nor does state law require that inapplicable statutory factors be deleted from the jury instructions. Davenport, 11 Cal.4th at 1230, 47 Cal.Rptr.2d 800, 906 P.2d 1068; People v. Turner, 8 Cal.4th 137, 207-08, 878 P.2d 521, 32 Cal.Rptr.2d 762

Jackson's claim that the statutory sentencing factors presented to the jury were vague is rejected outright. The United States Supreme Court has approved of California's death penalty scheme. See Brown, 479 U.S. at 540 n. *. The circuit has specifically held that "[w]hen a factor employed as an aid to determine whether the death penalty shall be imposed is challenged as being unconstitutionally vague under the Eighth Amendment, our view should be 'quite deferential." ' Bonin v. Calderon, 59 F.3d 815, 848 (9th Cir.1995) (quoting Tuilaepa v. California, 512 U.S. 967, 973, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)), cert. denied, 116 S.Ct. 718 (1996). This court must rely upon "the basic principle that a factor is not unconstitutional if it has some 'common-sense core of meaning ... that criminal juries should be capable of understanding." ' Tuilaepa, 512 U.S. at 973 (quoting Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)). Jackson has utterly failed to come anywhere near to meeting his burden of demonstrating that the sentencing factors used at the penalty phase of his trial were unconstitutionally vague. See Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (factor asking whether defendant was a "cold-blooded, pitiless slayer" is not unconstitutionally vague); Walton, 497 U.S. at 654 (factor asking whether "perpetrator inflict[ed] mental anguish or physical abuse before the victim's death" with "[m]ental anguish includ[ing] a victim's uncertainty as to his ultimate fate" is not unconstitutionally vague) (internal quotation

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(1994), cert. denied, 514 U.S. 1068, 115 S.Ct. 1702, 131 L.Ed.2d 564 (1995); People v. Clark, 3 Cal.4th 41, 169, 833 P.2d 561, 10 Cal.Rptr.2d 554 (1992), cert. denied, 507 U.S. 993, 113 S.Ct. 1604, 123 L.Ed.2d 166 (1993). Therefore there was no violation of state law such that Jackson can even claim that he had a liberty interest which was violated resulting in a deprivation of due process.

marks omitted); Proffitt v. Florida, 428 U.S. 242, 255-58, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (various "mitigating" factors were not unconstitutionally vague, nor was the inquiry of whether the crime was a "conscienceless or pitiless crime which [wa]s unnecessarily torturous to the victim") (internal quotation marks omitted); Jurek, 428 U.S. at 274-76 (factor asking "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" is not unconstitutionally vague).

As for Jackson's objection that the jury was not instructed as to which sentencing factors should be considered as aggravating and which factors should be considered as mitigating, there are several reasons that this claim fails. First, the United States Supreme Court has found that "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." Tuilaepa, 512 U.S. at 979. Second, the circuit previously rejected a claim based upon the statute's failure to specifically identify factors as aggravating or mitigating, finding that it was sufficient that the statutory factors guided the jury's discretion. Harris v. Pulley, 692 F.2d 1189, 1194 (9th Cir.1982) (citing Jurek, 428 U.S. at 270-73), reversed in part on other grounds, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). This holding certainly comports with the Supreme Court's ruling in Tuilaepa, and on that basis the Court rejects this aspect of Jackson's claim.

Jackson's complaint that the jury could have been mislead because they were instructed regarding mitigating factors that did not apply, and could have determined that the absence of a mitigating factor acted as an aggravating factor, has previously been rejected by the Ninth Circuit and thus cannot serve as a basis for relief from his death sentence here. In Williams v. Calderon, 52 F.3d 1465 (9th Cir.1995), cert. denied 516 U.S. 1124, 116 S.Ct. 937, 133 L.Ed.2d 863 (1996), the circuit found that since the jury was given a list of sentencing factors to consider and specifically instructed the jury to consider each factor only "if

applicable," presenting the jury with the complete list of sentencing factors "gave the jury more guidance, not less." Id. at 1481. Accordingly it was not an error to present the complete list of sentencing factors even if some did not apply. Id. Similarly, in Bonin the petitioner made the same argument that giving the jury the list of statutory mitigating circumstances permitted the jury "to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances." Bonin, 59 F.3d at 848. The circuit found that "[t]he cautionary words 'if applicable' warned the jury that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." Id. In the instant case the jury was instructed that it should consider the sentencing factors "if applicable." CT at 232. Therefore the Court denies Jackson relief on this claim regarding these instructions pursuant to the authority of Williams and Bonin.

XIX. Claim 5: California's 1978 Death Penalty Statute is Constitutionally Vague and Indefinite and Fails to Define the Class of Death Eligible Defendants

Jackson has withdrawn this claim from the amended petition based upon the Supreme Court's decision in Tuilaepa, 512 U.S. at 975-80, which made it clear that this claim has no merit.

XX. Claim 6: The Trial Court Abandoned its Role in When it Denied Jackson's Motion for Modification of the Penalty Verdict

Jackson claims that the trial court abandoned its statutory obligation when it denied his automatic motion for modification of the penalty verdict, and further erred when it considered the probation report before ruling on the motion. Section 190.4, subdivision (e) of the California Penal Code provides that whenever the jury returns a death verdict, the defendant is deemed to have moved for

modification of that verdict. The denial of the motion for modification is reviewable on the automatic appeal from the judgment. Pursuant to § 190.4 the trial judge, when examining the automatic application for modification of a death verdict, shall:

> review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

CAL. PENAL CODE § 190.4(e).

During the hearing on Jackson's motion for modification of the verdict, the Court stated:

> Well, I might just say that, Mr. Klump, and, Mr. Jackson, my personal preferences as far as whatever the appropriate sentence would be in the case are not the issue in the case.

The law is what it is. My personal feelings or my personal convictions don't bear into it and I think the jury has heard the matter, made a decision and I really don't feel it's my place to overrule the jury in that sense.

RT at 1670:2-9.

The court then denied the defense's motion to reduce the sentence to life without parole. RT at 1670:14-15. No reasons for the court's ruling were stated in the clerk's minutes of the hearing, as required by § 190.4(e).

Jackson, although recognizing that the jury determined that he should be sentenced to death, now claims that he was entitled to an independent review by the trial judge of the sentence. This claim is raised despite the fact that under § 190.4(e) the trial judge does not have total sentencing discretion after the jury fixes the sentence at death based upon their determination that the aggravating circumstances outweigh the mitigating circumstances.

Jackson contends that the trial court's failure to conduct an independent evaluation of the jury's decision, which was a state-mandated procedure, violated his state created liberty interest in having the hearing conducted pursuant to § 190.4(e). See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir.1993), cert. denied, Arave v. Fetterly, 513 U.S. 914, 115 S.Ct. 290, 130 L.Ed.2d 205 (1994). However, a federally recognized liberty interest only arises from the denial or misapplication of state procedures that results in the deprivation of a substantive right. Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir.1996), petition for cert. filed, 66 U.S.L.W. ----, (U.S. Sept. 10, 1997) (No. 97-5969); Bonin v. Calderon, 77 F.3d 1155, 1161 (9th Cir.) ("[f]ederal habeas corpus relief does not lie for errors of state law, unless the error amounts to a deprivation of the petitioner's constitutional rights."), cert. denied, 516 U.S. 1143, 116 S.Ct. 980, 133 L.Ed.2d 899 (1996); see also Campbell v. Blodgett, 997 F.2d 512, 522 (9th Cir.1992), aff'd on reh'g en banc, 18 F.3d 662 (9th Cir.), cert. denied, 510 U.S. 1215 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.1991). The Ninth Circuit has held that:

> [t]here is a distinction between state-created procedures and the substantive liberty interests those procedures are meant to protect. Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 1748, 75 L.Ed.2d 813 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."); Smith v. Sumner, 994 F.2d 1401, 1406-07 (9th Cir.1993). Only the denial or misapplication of state procedures that results in the deprivation of a substantive right will implicate a federally recognized liberty interest. See Olim, 461 U.S. at 250-51, 103 S.Ct. at 1748 (state procedures that do not protect substantive rights do not create independent substantive rights); Smith v. Sumner,

> 994 F.2d at 1406; Toussaint v. McCarthy, 801 F.2d 1080, 1096-97 & n. 15 (9th Cir.1986), cert. denied, 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987).

Moran v. Godinez, 57 F.3d 690, 698 (9th Cir.1994), cert. denied, Moran v. McDaniel, 516 U.S. 976, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995).

Here the purpose of the trial judge's review under § 190.4(e) is to determine whether the jury verdict is supported by the weight of the evidence. People v. Edwards, 54 Cal.3d 787, 819 P.2d 436, 447, 1 Cal.Rptr.2d 696, 707 (1991), cert. denied, 506 U.S. 841, 113 S.Ct. 125, 121 L.Ed.2d 80 (1992). However "the judge's function during this review 'is not to make an independent and de novo penalty determination." ' Dyer v. Calderon, 122 F.3d 720, 757 (9th Cir.1997) (quoting People v. Mickey, 54 Cal.3d 612, 818 P.2d 84, 135, 286 Cal.Rptr. 801, 852 (1991) (citation and quotation omitted), cert. denied, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992)), reh'g en banc granted, 1997 WL 631814 (9th Cir. Oct.9, 1997) (No. 95-99002). As the circuit itself has noted:

> Indeed, courts have repeatedly upheld pro forma reviews under § 190.4(e). See, e.g., People v. Allison, 48 Cal.3d 879, 258 Cal.Rptr. 208, 222, 771 P.2d 1294, 1318 (1989) (because the propriety of the sentence of death was "self-evident from the record," defendant "was not prejudiced by the trial judge's failure to adequately state his reasons" for upholding the verdict), cert. denied, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 964 (1990); Odle v. Calderon, 884 F.Supp. 1404, 1431 (N.D.Cal.1995) (affirming because the trial judge "made findings in the record, albeit cursorily").

Dyer, 122 F.3d at 757.

Here the trial judge indicated that his personal beliefs and convictions could not enter into the decision to uphold or vacate the jury's verdict. While Jackson interprets these statements as demonstrating that the trial judge expressly

declined to determine whether in his independent judgment the weight of the evidence supported the death penalty verdict, this Court finds a more reasonable reading of the record is that the trial judge did not believe that there was any legal basis to overturn the jury's determination, other than on "personal preferences." In other words, the statement of decision makes apparent that the trial court did not deem the death penalty verdict to be challengeable on legal grounds, rather the only issues regarding the sentence were issues of "personal feelings" or "personal convictions" on the death penalty per se, which should not enter into the trial court's decision. The judge's comments make clear his determination that the penalty balance was not close, a conclusion that is amply supported by the record. Nothing in the judge's ruling indicates a misunderstanding of his power under § 190.4(e).

It is true that the trial judge did fail to comply with the statutory mandate to "state on the record the reasons for his findings," and to "set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes." CAL. PENAL CODE § 190.4(e). Nevertheless, because the state statutory scheme provided Jackson with constitutionally adequate procedures to ensure that his death sentence was not imposed in an arbitrary manner nor disproportionate to the underlying crime, "any violation of state law did not result in the deprivation of a substantive right." [63] Bonin, 77 F.3d at 1162 (citing Moran, 57 F.3d at

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63. While Jackson complains that the trial judge did not give his automatic motion to modify the sentence from death to life imprisonment without possibility of parole the proper consideration, once a judgment of death is rendered at the trial court level, Jackson was entitled to an automatic appeal to the California Supreme Court. CAL. CONST. art. VI, sec. 11 ("The Supreme Court has appellate jurisdiction when judgment of death has been pronounced."); CAL. PENAL CODE § 1239(b)

698). Nor was the trial court's failure to state the reasons for denying the motion to modify the sentence on the record prejudicial because none of the evidence offered in mitigation offset, to any significant extent, the overwhelming aggravating circumstances, and the trial judge's reasons for deciding that the jury's verdict of death was not contrary to law or the evidence in the case are self-evident from the record. [64] There is absolutely no reason to believe that if

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(making review of all death sentences automatic); CAL. PENAL CODE § 190.6-190.8 (setting forth time and other requirements for automatic appeal to the supreme court). California's statutory scheme explicitly provides that the denial of the modification of the death penalty verdict shall be reviewed on the defendant's automatic appeal. See CAL. PENAL CODE § 190.4(e) (denial of the modification of the death penalty verdict "shall be reviewed on the defendant's automatic appeal"). The fact the California Supreme Court has already reviewed the denial of Jackson's motion to modify his sentence is sufficient to ensure Jackson's right to have a jury verdict that is not imposed in an arbitrary manner and is not disproportionate to the underlying crime.

64. Several aggravating factors were presented, including: (1) the circumstances of the instant crime and special circumstance pursuant to CAL. PENAL CODE 190.2(a)(7) (murder of peace officer engaged in performance of his duties); (2) Jackson's participation in the act of forcible sodomy on June 18, 1976, which occurred when both Jackson and the victim were in the army and stationed at Fort Knox, Kentucky; (3) Jackson's prior attack on Corporal Gregory Bennalack of the West Covina Police Department on July 5, 1983, which occurred when Jackson was intoxicated on PCP, as well as his threats to rape Bennalack's wife and kill his children; and (4) Jackson's prior convictions of burglary.

the trial court had provided a statement of reasons for its decision that it would have altered the court's decision not to upset the jury's determination that legally death was the appropriate punishment.

Finally, Jackson contends that the trial court improperly considered a probation report when considering the automatic motion for modification of the sentence. Under § 190.4(e) the trial court is limited to reviewing the evidence that was presented to the jury. People v. Lang, 49 Cal.3d 991, 1044, 782 P.2d 627, 264 Cal.Rptr. 386 (1989), cert. denied, 498 U.S. 881, 111 S.Ct. 224, 112 L.Ed.2d 178 (1990); People v. Jennings, 46 Cal.3d 963, 994-95, 760 P.2d 475, 251 Cal.Rptr. 278 (1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1559, 103 L.Ed.2d 862 (1989). [65] Jackson complains that

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In comparison, the mitigating evidence was relatively weak. Only two witnesses testified on Jackson's behalf at the penalty phase, his mother and his estranged wife. Sabrina Jackson, Jackson's estranged wife, testified that (1) he was a good father who loved his children; (2) he provided for his children when he was working; (3) they separated because of his drug problem; and (4) he was a good person who tended to mind his own business. Lillian Williams, Jackson's mother, testified about his lack of a relationship with his father, his drug use which started when he was fourteen years old, and the fact that he had never given his mother any trouble with respect to school. She further opined that Jackson had entered the army to try and make a new start in his life, although he never told her about his dishonorable discharge, and that he was sick and needed help.

65. Apparently the court and both counsel assumed consideration of the probation report would be proper for the purposes of the § 190.4(e) motion as the trial court announced its intention to obtain the report in open court and neither party voiced an objection. 19 RT at 1659:12-13.

the probation report "was very prejudicial, containing statements from the victim's family regarding the effect of the offense on their mental and emotional well being." Am. Pet. at 70. However, victim impact testimony is admissible during the penalty phase. Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). "Admission of such evidence will only be deemed unconstitutional if it is so unduly prejudicial that it renders the sentence fundamentally unfair." Gretzler v. Stewart, 112 F.3d 992, 1008 (9th Cir.1997) (citing Payne, 501 U.S. at 825). Here for the most part the very same information contained in the probation report regarding the victim's family was admitted without objection during the hearing on the motion for modification of the death verdict and the motion for a new trial when the court permitted the victim's mother and father to be heard. 20 RT at 1670:26- 1675:1. Jackson has not shown that any of the statements made by the victim's family was unduly prejudicial. Moreover, there is no indication that the trial court relied upon the statements of family members contained in the probation report rather than the testimony provided at the hearing, or that the trial court relied upon the information contained in the probation report at all in reaching its decision. The Court finds that while the trial court erred in considering the probation report, the error was harmless. See Williams, 52 F.3d at 1483. Accordingly Jackson is not entitled to relief on this claim.

CONCLUSION

1. Considering Jackson's claims of ineffective performance of counsel both individually and collectively, they do not violate the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. Jackson presents no clear and convincing evidence of actual innocence, either factual or legal.

3. Jackson shows no situation entitling him relief in this petition for writ of habeas corpus. No trial is perfect.

This trial was no exception but considering the record as a whole and the evidence of guilt, it cannot be said that Jackson has suffered any constitutional violations. The Court is not asked to look for perfection but rather to test the performance of counsel in terms of deficient performance and resulting prejudice, giving credit for the differences between lawyers with respect to choices of strategy. Mr. Klump did not stray outside the range of professionally competent assistance. There is nothing in his trial tactics that can be said to undermine the confidence in the outcome of Jackson's trial. Jackson has made no showing that anything he claims Mr. Klump did or did not present during trial, at both the guilt and penalty phase, would have changed the verdicts rendered by the jury who conscientiously and dispassionately sat through a trial in which there was little available to Mr. Klump to present to obtain a different result.

ORDER

Jackson has not demonstrated a right to habeas corpus relief based upon Claims 1, 3, 4, and 6 of the amended petition. The Court finds Claims 1, 3, 4, and 6 to be without merit and hereby DENIES relief on these claims. IT IS SO ORDERED.

Dated: November 14, 1997.

/s/ Judge Real
MANUEL L. REAL
United States District Judge